

87-1923 ①

Supreme Court, U.S.
FILED
MAY 3 1988

JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

RICHARD N. GARVER

Petitioner

vs.

THE UNITED STATES OF AMERICA
AND
UNITED STATES DEPARTMENT OF AGRICULTURE
Respondents

ON WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Thomas R. Smith
Attorney for Petitioner
CARROLL, BUNKE, HENKEL,
HAVERKAMP & SMITH
5856 Glenway Avenue
Cincinnati, Ohio 45238
(513) 922-3200

QUESTION PRESENTED

Whether Petitioner's Constitutional right to an impartial and fair agency proceeding was violated by the Judicial Officer's predisposition and bias which lead to his overruling the Decision of the Administrative Law Judge.



III

TABLE OF CONTENTS

	Page
Question Presented	I
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
	(Appendix B)
Statement of the Case	3
Reasons for Granting Writ	5
Conclusion	8
Appendix A	
Opinion of United States Court of Appeals for the Sixth Circuit	A-1
Order of United States Department of Agriculture Denying Petition for Reconsideration	A-6
Decision and Order of Judicial Officer	A-12
Appendix to Decision and Order	A-32
Decision and Order of Administrative Law Judge	A-54
Appendix B	
Fifth Amendment to the Constitution of the United States	B-1
5 U.S.C. 544(d) (1982 ed.)	B-1
5 U.S.C. 556(b) (1982 ed.)	B-2
5 U.S.C. 558(b) (1982 ed.)	B-3
5 U.S.C. 201(b) (1982 ed.)	B-4
7 U.S.C. 203 (1982 ed.)	B-4
7 U.S.C. 204 (1982 ed.)	B-5
7 U.S.C. 213(a) (1982 ed.)	B-5

IV

	Page
7 U.S.C. 228b (1982 ed.)	B-6
28 U.S.C. 455 (1982 ed.)	B-7
7 C.F.R. 1.142(c) (1986)	B-10
7 C.F.R. 2.35 (1986)	B-10
9 C.F.R. 201.27 (1986)	B-11
9 C.F.R. 201.28 (1986)	B-12
9 C.F.R. 201.29 (1986)	B-12
9 C.F.R. 201.30 (1986)	B-13
9 C.F.R. 203.10 (1986)	B-16

TABLE OF CASES

<i>Bowens v. North Carolina Department of Human Resources</i> , 710 F.2d 1015 (4th Cir. 1983)	6
<i>First National Monetary Corp. v. Weinberger</i> , 819 F.2d 1334 (6th Cir. 1987)	5
<i>In Re M. Ibrahim Khan</i> , 751 F.2d 162 (6th Cir. 1983)	5
<i>Marshall v. Jerrico</i> , 446 U.S. 238 (1980)	6, 7
<i>Schweiker v. McClure</i> , 456 U.S. 188 (1982)	6
<i>United States v. Grinnell Corp.</i> , 384 U.S. 563 (1966)	5
<i>United States v. Story</i> , 716 F.2d 1088 (6th Cir. 1983)	5
<i>Utica Parking Co. v. Block</i> , 781 F.2d 71 (6th Cir. 1986)	7
<i>Withrow v. Larkin</i> , 421 U.S. 35 (1975)	6, 7

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NO. _____

RICHARD N. GARVER

Petitioner

vs.

THE UNITED STATES OF AMERICA,
and
UNITED STATES DEPARTMENT OF AGRICULTURE
Respondents

**PETITION FOR WRIT OF CERTIORARI TO THE
SIXTH CIRCUIT COURT OF APPEALS**

To the Honorable William H. Rehnquist, Chief Justice,
and Associate Justices of the Supreme Court of the United
States of America.

Richard N. Garver, the petitioner herein, prays that a Writ
of Certiorari issue to review the judgment of the Sixth Circuit
Court of Appeals entered in the above entitled case on
February 3, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the
Sixth Circuit is unreported and is printed in Appendix A,
page A-1. The Order denying Petition for reconsideration is
printed in Appendix A, page A-6. The Decision and Order of
the Judicial Officer for the United States Department of

Agriculture with appendix, is printed in Appendix A, page A-12. Decision and Order of the Administrative Law Judge is printed in Appendix A, page A-54.

JURISDICTION

The judgment of the Sixth Circuit Court of Appeals was entered on February 3, 1988. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

5 U.S.C. 544 (d) (1982 ed.)	B-1
5 U.S.C. 556 (b) (1982 ed.)	B-2
5 U.S.C. 558 (b) (1982 ed.)	B-3
5 U.S.C. 201 (b) (1982 ed.)	B-4
7 U.S.C. 203 (1982 ed.)	B-4
7 U.S.C. 204 (1982 ed.)	B-5
7 U.S.C. 213(a) (1982 ed.)	B-5
7 U.S.C. 228b (1982 ed.)	B-6
28 U.S.C. 455 (1982 ed.)	B-7
7 C.F.R. 1.142(c) (1986)	B-10
7 C.F.R. 2.35 (1986)	B-10
9 C.F.R. 201.27 (1986)	B-11
9 C.F.R. 201.28 (1986)	B-12
9 C.F.R. 201.29 (1986)	B-12
9 C.F.R. 201.30 (1986)	B-13
9 C.F.R. 203.10 (1986)	B-16

STATEMENT OF CASE

Petitioner, Richard N. Garver, has been self employed in the business of buying and selling livestock since approximately 1959. In 1982 or 1983, Petitioner changed from selling cattle on a commission basis to "grade-and-yield" which meant that he would purchase an animal for a fixed price and then would either profit or lose money on the sale to the packer, depending on whether the animal, after it was slaughtered, had the anticipated quality of meat.

During all relevant times, Petitioner's bookkeeping methods were, to say the least, primitive. Petitioner put all sales slips, purchase slips, etc., in a paper bag and took them to a bookkeeper once a month. His wife deposited the checks as they were received, but Petitioner kept no records of accounts receivable.

From approximately 1974 to 1984, Petitioner had an arrangement with his bank under which the bank would routinely honor overdrafts and would charge Petitioner a handling charge, although this was seldom necessary. However, in September, 1984, the bank, with no notice to Petitioner, unilaterally withdrew his line of credit. Shortly before the bank took this action, Petitioner had written a number of checks for cattle purchases, which checks were subsequently not honored by the bank.

Respondent filed its Complaint against Petitioner on November 8, 1984, alleging willful violations of the Packers and Stockyards Act (7 U.S.C. 181, et seq.). The matter came on for hearing before an administrative law judge and the ALJ thereafter issued an Order which stated in pertinent part:

"Respondent (Petitioner) is suspended as a registrant under the Act for two years and thereafter until such time as he demonstrates that he is no longer insolvent; *provided* that after the expiration of a thirty-day period the remainder of the two-year suspension is held in abeyance on condition that Respondent remain in the

employ of Eldon Ginn in accordance with the Employment and Escrow Agreement recited in Findings 13 and 14 in Respondents' Exhibit 1; and Eldon Ginn maintaining a bond adequate to include Respondent's employment."

Respondent filed an administrative appeal which was reviewed by the Judicial Officer of the United States Department of Agriculture, the final deciding officer in adjudication proceedings to 7 C.F.R. 2.35 (1985). The Judicial Officer had a substantial history of service with the United States Department of Agriculture, having been with the Department for over twenty years before being appointed Judicial Officer in 1971. The Judicial Officer overruled the Order of the ALJ and eliminated that portion of the Order holding the suspension in abeyance. Attached to the Decision and Order was a rambling twenty-six page appendix which clearly outlined the manner in which, through his years of participation in the Department, the Judicial Officer arrived at his views of sanctions and the weight which must be given to the Department's preferences.

Petitioner filed a Petition for Reconsideration of the Judicial Officer's Order, which Petition was denied. Petitioner then filed a Petition for Review before the United States Court of Appeals for the Sixth Circuit. The Court affirmed the Decision and Order of the Judicial Officer, holding that the Judicial Officer's Decision and Order was not a result of prejudice towards Petitioner but rather merely a difference of opinion in the justification for a harsh sanction.

REASONS FOR GRANTING THE WRIT

I. BIAS OF JUDICIAL OFFICER TOWARDS DESIRES OF DEPARTMENT OF AGRICULTURE DENIED PETITIONER HIS CONSTITUTIONALLY PROTECTED RIGHT TO A FAIR AND IMPARTIAL DECISION

The Sixth Circuit Court of Appeals misconstrued the manner Petitioner was denied his Fifth Amendment right to an impartial hearing. The Court, on page 5 of its Decision, couched Petitioner's claim as a disagreement regarding the harshness of the sanction.

The prerequisite for a disqualifying "personal" bias, as opposed to a disagreement over the outcome is that

the alleged bias 'must stem from an extra-judicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' *United States v. Grinnell Corp.*, 384 U.S. 563, 86 S.Ct. 1698, 1710, 16 L.Ed.2d 778 (1966). See also *In re M. Ibrahim Khan*, 751 F.2d 162, 164 (6th Cir. 1984). . . . The bias must be personal, not judicial. It must arise " 'out of the judge's background and association' and not from the 'judge's view of the law.' " *United States v. Story*, 716 F.2d 1088, 1090 (6th Cir. 1983) (quoting *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 180 (6th Cir. 1974), *cert. denied* 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975)).

First National Monetary Corp. v. Weinberger, 819 F.2d 1334, 1337 (6th Cir. 1987).

However, in the present case the unconstitutional bias does not arise from the Judicial Officer's preconceived notions regarding the need for severe sanctions, but rather from his predisposition to grant the request of the Department of Agriculture.

It is well established that there is a presumption that an administrative official charged with performing judicial or quasi-judicial functions will do so in a fair and unbiased manner (*Withrow v. Larkin*, 421 U.S. 35, 47 (1975); *Schweiker v. McClure*, 456 U.S. 188, 195 (1982).) However, the courts have repeatedly found that the presumption can be overcome, but that the burden of establishing disqualifying bias is upon the person making the contention. *Schweiker v. McClure*, *supra*, at 196. Further, the bias must be realistic and more than remote. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 250 (1980).

Due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities. *Schweiker v. McClure*, *supra*, at 195. See, also, *Marshall v. Jerrico, Inc.*, *supra*, at 242. Petitioner contends that the only truly impartial actor in this matter was the ALJ and that the Judicial Officer usurped the ALJ's judgment and replaced it with his own, in accordance with the request of the Department of Agriculture.

As the court stated in *Bowens v. North Carolina Department of Human Resources*, 710 F.2d 1015, 1020 (4th Cir. 1983), "to be disqualifying, personal bias must stem from a source other than knowledge a decision maker acquires from participating in a case." It is quite evident that the Judicial Officer's bias and predisposition arises from factors not presented in this case. The lengthy appendix to the Decision and Order of the Judicial Officer contains ample evidence of the Judicial Officer's predisposition to accept the recommendations of the Respondent, notwithstanding the consideration given to the matter by the ALJ. For example, the Judicial Officer made the following statement:

"In addition, in determining sanctions to be imposed under the act, great weight should be given to the recommendations of the officials charged with responsibility for administering the regulatory program." (Appendix to Decision and Order docketed June 19, 1986 at A-48-49).

It should be noted that the authority cited by the Judicial Officer as precedent is a case that he himself decided.

Another factor to consider in determining whether the bias of the Judicial Officer denied Petitioner's right to due process is whether "under realistic appraisal of psychological tendencies and human weakness" *Withrow v. Larkin, supra*, at 47; *cf., Marshall v. Jerrico, Inc., supra*, at 252, the Judicial Officer was able to look at specific facts of the present case and render an unbiased decision. Clearly, he could not. As noted earlier, the Judicial Officer has spent over twenty years with the Department of Agriculture before being appointed to his present position. Further, he has espoused the need to weigh heavily the recommendations of the Department.

This is not the first time that the Department of Agriculture has violated the due process rights of a litigant by failing to provide an impartial hearing. In *Utica Packing Co. v. Block*, 781 F.2d 71 (6th Cir. 1986), the court remanded a decision by the same Judicial Officer because of his failure to consider mitigating circumstances, in other words, his failure to make a fair and impartial decision. The court in *Utica* made the following on-point statement, "... the requirement of a fair trial before a fair tribunal . . . requires the appearance of fairness in the absence of a probability of outside influences on an adjudicator; it does not require proof of actual partiality." *Id.*, at 77.

In the present case, the Sixth Circuit found no evidence of bias on the part of the Judicial Officer. However, that finding must be tempered by its opinion that "we have here simply a dispute over the validity of a particular sanction, the type of argument that can be made in every type of punitive or correctional decision." It is important to note that it has never been argued on behalf of Petitioner that the sanction ordered by either the ALJ or the Judicial Officer was not within the jurisdictional limits. Rather, the Petitioner was denied his due process rights by having the ALJ's ruling simply replaced by that of the Judicial Officer. Therefore, the only impartial decision maker, the ALJ, has been, in effect, rendered a nulli-

ty and it becomes readily apparent that, because the Department of Agriculture did not like the decision and sanction rendered by the ALJ, it simply appealed to an entity which it knew full well would render a decision in accord with its desires.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Dated: April 29, 1988

Respectfully submitted,

Thomas R. Smith
Counsel for Petitioner
CARROLL, BUNKE, HENKEL,
HAVERKAMP & SMITH
5856 Glenway Avenue
Cincinnati, Ohio 45238

APPENDIX A

NOT FOR PUBLICATION

No. 86-4081

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

RICHARD N. GARVER,

Petitioner,

v.

**UNITED STATES OF AMERICA and
UNITED STATES DEPARTMENT OF AGRICULTURE,
Respondents.**

On Appeal From The Department of Agruculture

OPINION

(Filed February 3, 1988)

**BEFORE: JONES and BOGGS, Circuit Judges, and
PECK, Senior Circuit Judge.**

BOGGS, Circuit Judge. Richard Garver, a registered livestock dealer under the Packers and Stockyards Act, 7 U.S.C. §§ 201(d) & 203 (the Act), caused a loss of over \$700,000 to other parties in the livestock business. After a hearing, an Agriculture Department administrative law judge found that Garver failed to meet the solvency requirements of the Act in violation of 7 U.S.C. § 204; that he willfully violated the fair trade practice requirements of the Act, 7 U.S.C. § 213(a); and that he willfully violated the prompt pay mandate of the Act, 7 U.S.C. § 228b. Although the Packers and Stockyards Administration asked that Garver be

suspended for two years, the ALJ determined that a thirty-day suspension, coupled with an arrangement whereby Garver would continue operating under the bond of another dealer in an attempt to pay off his debts, would be a sufficient sanction. The Packers and Stockyard Administration appealed, and the Agriculture Department Judicial Officer, the Secretary's designate for these purposes, imposed a two-year suspension as a sanction. See 7 C.F.R. §§ 1.142(c), 1.145(i) 2.35.

Upon consideration of the parties' briefs and the record of the administrative proceedings, we find that the Judicial Officer's choice of sanction is not unwarranted in law or without justification in fact. Accordingly, we affirm the imposition of the two-year sanction.

Garver does not contest the charges against him. Rather he argues that the two-year sanction must be overturned due to bias on the part of the Judicial Officer.

This court does not review administrative agency sanctions for reasonableness, or for whether they comport with our ideas of justice. The Supreme Court clearly held in *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 187-88 (1973), that those determinations are for the agency:

The employment of a sanction . . . [is] not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases. . . . The Secretary's practice . . . is to employ that sanction as in his judgment best serves to deter violations and achieve the objectives of that statute. Congress plainly intended in its broad grant to give the Secretary that breadth of discretion.

The sanction in this case was among those permitted by the authorizing statute and the departmental regulation, and the statute and regulation themselves are not challenged.

Garver, instead, rests his attack on certain past writings of the Judicial Officer, Donald Campbell. In those writings, which were in earlier decisions officially published in the

Agricultural Decisions series,¹ Campbell opined at some length about the usefulness of severe sanctions as a deterrent to future misconduct and cited various advocates of the virtues of punishment in support of his opinion. In his brief on appeal, Garver takes particular offense at Campbell's citations of "Plato, Socrates and Nietzsche" though he does not mention the references by Campbell to possibly more relevant modern writers on criminology such as Gordon Tullock and Isaac Ehrlich.²

While it may seem strange to some, including Garver, to observe such sentiments from a minor Agriculture Department official, the debate itself is long and honorable (as well as relevant). Past legal scholars and judges, including Jeremy Bentham,³ H.L.A. Hart,⁴ Lord Mansfield and Chief Justice John Bannister Gibson of the Pennsylvania Supreme Court⁵

¹ E.g. *In re Worsley*, 33 Agric. Dec. 1547 (1974).

² Tullock, "Does Punishment Deter Crime?" 36 *The Public Interest* 103, 109 (Summer 1974); and Ehrlich, "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation," 81 *Journal of Political Economy* 545 (May-June 1973) (cited in *Worsley*, 33 Agric. Dec. at 1566 n. 40 & n. 40a).

³ See e.g. Bentham, *Principles of Penal Law*, Works (Bowring Ed.) (1843).

⁴ See e.g. Hart, *The Morality of the Criminal Law* (1965); Hart, *Prolegomenon to the Principles of Punishment* (1959).

⁵ Karl Llewellyn commented on the effect of Mansfield's and Gibson's decisions in language particularly apt here:

[S]ome of the sparks caused by Mansfield and Gibson, great judges though both were, were struck by a brusqueness of manner and language toward men and toward tradition which is no part of that grace in work which is the Grand Style at its best. For let me repeat: "style" refers in this connection not to literary quality or tone, but to the manner of doing the job, to the way of craftsmanship in office, to a functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need. This can conceivably work out into florid words or into ponderous

have broken the ground Campbell now plows. The fact that Judicial Officer Campbell holds and cites such views cannot be considered evidence of judicial bias. In the particular case, there is no indication whatsoever that Campbell did not function in a judicial capacity, or that he entertained preconceived notions as to a sanction in this particular case.

The prerequisite for a disqualifying "personal" bias, as opposed to a disagreement over the outcome is that

the alleged bias 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.' *United States v. Grinnell Corp.*, 384 U.S. 563, 583, 86 S.Ct. 1698, 1710, 16 L.Ed. 2d 778 (1966). See also *In re M. Ibrahim Khan*, 751 F.2d 162, 164 (6th Cir. 1984). . . . The bias must be personal, not judicial. It must arise " 'out of the judge's background and association' and not from the 'judge's view of the law.' " *United States v. Story*, 716 F.2d 1088, 1090 (6th Cir. 1983) (quoting *Oliver v. Michigan State Board of Education*, 508 F.2d 178, 180 (6th Cir. 1974), *cert. denied* 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed. 2d 449 (1975)).

First National Monetary Corp. v. Weinberger, 819 F.2d 1334, 1337 (6th Cir. 1987).

In his original opinion, Campbell discussed at some length the particular gravity of Garver's offenses, and how the ALJ's proposed sanction compared with sanctions given for other offenses. In response to a motion for reconsideration raising essentially the points raised on this appeal, Campbell

Elizabethan euphuism; if so, I am prepared to be laden with the language if I may have the thing. But it is worthy of note (and it is perhaps some evidence that style grips in one fist more phases of man and culture than we always realize) that work in the Grand Style has, historically, tended into simplicity of verbal form and of sentence and paragraph structure, in combination with a certain pungency.

specifically addressed the magnitude of the loss caused by Garver in comparison with the losses caused by the general run of defaults which had occurred under the jurisdiction of this program. There certainly was nothing in his response which indicated bias, or a refusal to consider the arguments made.

We have here simply a dispute over the validity of a particular sanction, the type of argument that can be made in every type of punitive or correctional decision. It certainly is true, as Garver's counsel points out, that if Garver is suspended, he will no longer be able to use the proceeds from this profession (apparently the only one he knows) to attempt to pay off his debt. But that equally would be true of any period of incarceration imposed for any financial crime. In addition, as this is not a criminal proceeding, but an administrative one, our powers of review for these reasons are even more limited.

Even though any or all of our judges may feel that the sanction was too harsh, or that we might have come to a different conclusion, there simply is not evidence, let alone any preponderance of evidence, that this decision was a result of cognizable personal bias. There is no indication in the record that Campbell's decision is based on any information apart from what he learned from his participation in this case and from his years of service as the Department of Agriculture's Judicial Officer. Consequently, there is no evidence of disqualifying bias before us.

It may be sound advice to all judges and judicial officers to be as temperate as possible when rendering decisions. It would, however, be a great disservice to imply that a vigorous expression of views on a subject appropriately before the tribunal can become evidence of judicial bias.

Accordingly, the final decision of the Secretary of Agriculture imposing the sanction of a two-year suspension is **AFFIRMED**.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

P. & S. Docket No. 6449

In re: RICHARD N. GARVER,
Respondent.

**ORDER DENYING PETITION FOR
RECONSIDERATION**

(Filed September 29, 1986)

On August 15, 1986, respondent filed a petition for reconsideration challenging Finding of Fact 11 and arguing that a severe sanction is inappropriate and would have no deterrent effect on respondent or others.

Finding 11, which relates to respondent's sale of property used as security by the bank for its line of credit, and the bank's termination of the line of credit, is fully supported by the record. Moreover, it makes no difference why the bank terminated its line of credit. As stated in the original decision herein, note 2, the "bank's action in withdrawing respondent's line of credit did not cause his loss of at least \$700,000 [which is the actual cause of respondent's failure to pay], but merely exposed his insolvent condition."

As to the appropriateness of the sanction, respondent argues that a severe sanction should only be imposed in non-payment cases where the nonpayment occurred because of fraud. Respondent's argument would, however, emasculate the 1976 payment provisions enacted by Congress. The Act was amended in 1976 to provide (7 U.S.C. § 228b):

§ 228b. *Prompt payment for purchase of livestock*

(a) *Full amount of purchase price required; methods of payment*

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day

following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) *Waiver of prompt payment by written agreement; disclosure requirements*

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the ac-

counts or other documents issued by the purchaser relating to the transaction.

(c) *Delay in payment or attempt to delay deemed unfair practice*

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

The 1976 payment amendment does not use the term fraud or any synonym thereof. Congress was not concerned merely with fraudulent failures to pay. Congress was concerned with all failures to pay (see the legislative history quoted in the original decision herein at 18). The 1976 payment amendment was enacted because livestock buyers (primarily packers) failed to pay for substantial amounts of livestock. See *In re Beef Nebraska, Inc.*, 44 Agric. Dec. ____ (Nov. 26, 1985), *appeal docketed*, No. 85-2534 (8th Cir. Dec. 31, 1985). As stated in the House Report on the 1976 amendatory legislation (H.R. Rep. No. 1043, 94th Cong., 2d Sess. 5 (Apr. 14, 1976)):

Between 1958 and early 1975 167 packers failed, leaving livestock producers unpaid for over \$43 million worth of livestock. By far the largest of such failures was that of American Beef Packers (ABP), which went bankrupt in January, 1975, leaving producers in 13 states unpaid for a total of over \$20 million in livestock sales.

The average loss to livestock sellers as a result of each packer failure from 1958 through early 1975 was \$257,485.02 ($\$43,000,000 \div 167 = \$257,485.02$). If we omit the one \$20 million failure of American Beef Packers, the average loss to livestock sellers from each packer failure from 1958 through

early 1975 was \$138,554.21 ($\$23,000,000 \div 166 = \$138,554.21$). In contrast, respondent Garver's financial failure caused livestock sellers to lose about \$700,000, or more than five times the average loss caused by packer failures, excluding American Beef ($\$700,000 \div \$138,554.21 = 5.05$).

Accordingly, respondent Garver's violations are extremely serious, warranting a very severe sanction under the Department's sanction policy, set forth in the original decision herein. The 2-year suspension order issued in this case is not out of line with numerous severe sanctions that have been issued in recent years under the Packers and Stockyards Act, e.g., *In re Welch*, 45 Agric. Dec. ____ (Sept. 25, 1986) (decision as to Michael Benson) (1-year suspension from engaging in business subject to Act and \$10,000 civil penalty); *In re Holiday Food Services, Inc.*, 45 Agric. Dec. ____ (May 8, 1986) (\$50,000 civil penalty), *appeal docketed*, No. 86-7332, (9th Cir. June 6, 1986); *In re Corn State Meat Co.*, 45 Agric. Dec. ____ (May 8, 1986), (\$50,000 civil penalty); *In re Blackfoot Livestock Commission Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986) (6-month suspension), *appeal docketed*, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Farmers & Ranchers Livestock Auction, Inc.*, 45 Agric. Dec. ____ (Feb. 27, 1986) (decision as to Millspaugh) (5-year suspension, but permitting respondent to be employed as an auctioneer after 1 year); *In re Saylor*, 44 Agric. Dec. ____ (Sept. 20, 1985) (decision on remand) (8-month suspension and \$10,000 civil penalty); *In re ITT Continental Baking Co.*, 44 Agric. Dec. ____ (Mar. 18, 1985), *final consent decision*, 44 Agric. Dec. ____ (Oct. 24, 1985) (\$10,000 civil penalty); *In re Mid-West Veal Distributors*, 43 Agric. Dec. ____ (July 13, 1984) (\$77,000 civil penalty, with \$27,000 suspended); *In re Mayer*, 43 Agric. Dec. ____ (Apr. 12, 1984) (decision as to Doss) (2-year suspension), *appeal dismissed*, No. 84-4316 (5th Cir. July 25, 1984); *In re Peterman*, 42 Agric. Dec. ____ (Dec. 12, 1983), *aff'd*, 770 F.2d 888 (10th Cir. 1985) (\$20,000 civil penalty).

If respondent's payment violations had resulted from fraud, a much more severe sanction would have been appropriate.

Respondent argues that there is no deterrent value to a

severe sanction where a person merely cannot pay his bills. However, that same argument was rejected in a case under the Perishable Agricultural Commodities Act, *In re Foursome Brokerage, Inc.*, 42 Agric. Dec. —, slip op. at 19-20 (Dec. 5, 1983), *aff'd per curiam*, 747 F.2d 1463 (5th Cir. 1984) (unpublished), in which the Judicial Officer stated:

A number of respondent's creditors expressed the view that a sanction imposed on respondent would not have any deterrent effect on respondent or others in the industry. Judge Palmer also expressed the view (Tr. 268) that severe sanctions have no effect in deterring payment violations since —

People don't pay their bills, because they don't have the money, and I don't care what you do in any of these cases. That is not going to change one thing.

That view overlooks the fact that a person who fears a severe sanction if he violates the payment provisions of the Act can take steps to minimize the likelihood of payment violations. For example, he can obtain adequate capitalization before starting in business. (The record in this case suggests that respondent was undercapitalized.) He can also refrain from knowingly selling to risky purchasers, who frequently pay a little more than other purchasers, if they pay at all, but who cause serious problems if they fail to pay. In addition, he can avoid letting one firm get too deeply in debt to him and carefully monitor the payment practices of all his debtors.

Adequate clerical staff can also be employed to assure prompt attention to the paperwork involved in produce transactions. (The record here suggests that respondent, at times, had inadequate clerical staff to handle the heavy volume of paperwork.) Where more than one person is involved in buying produce for a firm, reporting and review procedures can be utilized to catch potential problems in their incipency. (The record here suggests that Mr. Patlan was permitted to freewheel without supervision or review.)

The records I have reviewed in about 40 payment violation cases have convinced me that there are many steps that can be taken to minimize the likelihood of payment violations. Accordingly, severe sanctions imposed on payment violators should have a significant deterrent effect in the produce industry. *In re Worsley*, 33 Agric. Dec. 1547, 1558-67 (1974).

The same reasoning is applicable to the livestock industry. Furthermore, as stated in the original decision herein (slip op. at 17), violations involving fraud normally deprive a livestock seller of only about 1% of the value of his livestock, whereas a failure to pay deprives the livestock seller of 100% of the value of his livestock. Accordingly, failure to pay violations, whether resulting from fraud or not, warrant a very severe sanction.

For the foregoing reasons, respondent's petition for reconsideration should be denied.

Order

Respondent's Petition for Reconsideration is denied.

Done at Washington, D.C.

September 29, 1986

/s/ DONALD A. CAMPBELL
Judicial Officer

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

P. & S. Docket No. 6449

In re: RICHARD N. GARVER,
Respondent.

DECISION AND ORDER
(Filed June 19, 1986)

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*).* An initial Decision and Order was filed on January 29, 1986, by Chief Administrative Law Judge John A. Campbell (ALJ) ordering respondent to cease and desist from failing to pay for livestock and issuing insufficient funds checks. The order also suspends respondent's registration for 2 years and thereafter until he is no longer insolvent, except that all but 30 days of the suspension period is held in abeyance.

On March 4, 1986, complainant, seeking to eliminate that portion of the order holding the suspension order in abeyance, appealed to the Judicial Officer, to whom final administrative authority to decide the Department's cases subject to 5 U.S.C. §§ 556 and 557 has been delegated (7 C.F.R. § 2.35).** On April 21, 1986, the case was referred to the Judicial Officer for decision.

* See generally Campbell, "The Packers and Stockyards Act Regulatory Program," in 1 Davidson, *Agricultural Law*, ch. 3 (1981 and Aug. 1985 Supp.), and Carter, "Packers and Stockyards Act," in 10 Harl, *Agricultural Law*, ch. 71 (1980).

** The position of Judicial Officer was established pursuant to the Act of April 4, 1940 (7 U.S.C. §§ 450c-450g), and Reorganization Plan No. 2 of 1953, 18 Fed. Reg. 3219 (1953), *reprinted in* 5 U.S.C. app. at 1068 (1982). The Department's present Judicial Officer was appointed in January 1971,

Based upon a careful consideration of the record, I agree with complainant's position on appeal. The ALJ's initial Decision and Order is adopted as the final Decision and Order in this case, with changes too minor to itemize, except that the provisions of the order holding the suspension order in abeyance are eliminated, together with the ALJ's reasons therefor. Additional conclusions by the Judicial Officer follow the ALJ's conclusions.

ADMINISTRATIVE LAW JUDGE'S INITIAL DECISION (AS MODIFIED)

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereafter referred to as the "Act", instituted by a complaint filed on November 8, 1984, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The complaint charges that the respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204) and that he willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a) 228(b) by issuing nonsufficient funds checks and failing to pay, when due, for livestock.

Respondent filed an answer on January 2, 1985, in which he admitted all but one of the material allegations of the complaint. An oral hearing was held in Cincinnati, Ohio on September 18, 1985. Respondent was represented by Thomas R. Smith, Esq., and complainant was represented by Barbara S. Harris of the Office of the General Counsel. At the close of the hearing the time was set for the filing of briefs.

having been involved with the Department's regulatory programs since 1949 (including 3 years' trial litigation; 10 years' appellate litigation relating to appeals from the decisions of the prior Judicial Officer; and 8 years as administrator of the Packers and Stockyards Act regulatory program) (December 1962—January 1971).

Findings of Fact¹

1. Richard N. Garver, hereafter referred to as the respondent, is an individual whose business mailing address is 9226 Hiner Road, Wooster, Ohio 44691.

2. The respondent, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. As of September 30, 1984, the respondent's current liabilities exceeded his current assets.

4. Respondent's current liabilities presently exceed his current assets.

5. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefore, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn.

DATE OF CHECK (1984)	CHECK ISSUED TO	NO. OF HEAD	AMOUNT OF CHECK
9/22	Paul Stewart	75	27,454.61
9/22	Marietta Livestock Sales	28	9,907.15
9/17	Scio Livestock Auction	11	3,407.96
9/23	Scio Livestock Auction		1,319.27
9/15	Bill Martin		36,084.40
9/18	Producer's Lvsk. Assoc.	132	67,369.99
9/24	Producer's Lvsk. Assoc.	215	130,063.83
9/18	Producer's Lvsk. Assoc.	44	32,932.47
9/19	Producer's Lvsk. Assoc.	45	32,277.67

¹ Findings 1 through 7, accepted as accurate by respondent, are restated herein. Findings 8, 9, and 10 were proposed by respondent and are included herein, along with my additional findings 11 through 16.

A-15

DATE OF CHECK (1984)	CHECK ISSUED TO	NO. OF HEAD	AMOUNT OF CHECK
9/19	Producer's Lvsk. Assoc.	128	64,061.78
9/24	Producer's Lvsk. Assoc.	211	141,303.32
9/15	Athens Livestock	40	12,213.97
9/15	Jerry Caldwell	163	45,231.54
9/20	Jerry Caldwell	274	73,271.71

6. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below and in Finding of Fact No. 5, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

1984 DATE OF PURCHASE	PURCHASED FROM	AMOUNT	NO. OF HEAD
9/24	Carrollton Livestock Auction	5,086.65	14
9/17, 19	Muskingum Livestock Sales	19,408.10	58
9/22	Paul Stewart	32,451.65	97
9/8, 15, 22	Barnesville Livestock	15,794.76	92
9/20	Chickasaw Stock Yard	4,082.04	10
	Scio Livestock Auction	2,177.38	
9/21	Livestock Market of Spencer	7,299.35	20
9/3, 10, 11	Bill Martin	202,460.18	432
9/11, 18	Roger Taylor	31,609.50	82
8/10	Athens Livestock	1,239.00	1
9/15	Athens Livestock	9,199.50	26
9/22	Athens Livestock	8,717.11	26
9/22	United Livestock Sales Co.	23,306.87	64
9/24	Jerry Caldwell	13,705.88	55

7. As of September 18, 1985, there remained unpaid a total of at least \$700,000.00 for such livestock purchases set forth in Findings of Fact Nos. 5 and 6.

8. For ten (10) years prior to September, 1984, respondent had a business arrangement with his bank under the

terms of which the bank honored all overdrafts on his account and charged respondent a fee established by the bank for doing so.

9. At the time that respondent issued the checks identified in Finding No. 5, the arrangement with the bank was in full force and effect and respondent had no reason to believe that the checks would not be honored by his bank.

10. Respondent did not provide checks to persons from whom he had purchased cattle knowing that those checks would be returned because of insufficient funds.

11. Respondent's bank arrangement, noted in Findings 8 and 9, whereby the bank would pay for respondent's overdrafts, was secured by property. When the property was sold there was no longer any collateral to secure respondent's line of credit, and the bank terminated the agreement.

12. Respondent's bookkeeping methods were archaic if not primitive. He maintained no records of accounts receivable and, consequently, had no way of knowing how much he was owed or by whom. For example, respondent testified that it was his custom to visit his bookkeeper once a month, taking all of his bills, sales slips, and bank statements to her in a grocery bag.

13. Since early 1985, respondent has been working as a commissioned buyer of livestock for Elden Ginn who operates a stockyard and sells cattle on a commission basis only. In order to have respondent work for him, it was necessary for Mr. Ginn to increase his own bond from \$55,000.00 to \$100,000.00.

14. Under respondent's arrangement with Ginn, respondent is paid \$275.00 per week for salary and expenses. All commissions earned by him are segregated and (except for taxes, a \$100.00 per month payment to Ginn's bookkeeper, and respondent's \$275.00 salary) are distributed to respondent's creditors quarterly. The arrangement is contained in respondent's Exhibit No. 1. Respondent acts purely as an agent for Ginn and has no access to funds.

15. At the time of hearing (September 18, 1985), approximately \$4,800.00 had been distributed to creditors under the

arrangement with Ginn and it was expected that approximately \$6,000.00 more would be paid within several weeks of the hearing.

16. Respondent had not been suspended under the Act prior to this proceeding.

Conclusions

All contentions of the parties have been considered in the light of the record evidence. By reason of the above findings of fact, it is concluded that respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204), and that respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by failing to pay, when due, and by issuing nonsufficient funds checks, for livestock. The order proposed by complainant is issued. . . .

Willful Violations of the Act

Complainant correctly contends that respondent's failure to pay for livestock and respondent's issuance of nonsufficient funds checks were willful violations of Sections 312(a) and 409 of the Act.

Respondent admits such practices but argues that his relationship with his bank and the over-draft protection the bank extended to him demonstrate that he did not willfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's over-draft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.

A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally terminated his over-draft protection without notice. Similarly, over-draft protection would be of no value

if respondent's bank were to fail. As stated in *In re Thumb Auction Markets, Inc.*, 37 A.D. 164, 167-168 (1977). "Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements. . . ."

Decisions under the Act and regulations have established that a line of credit or over-draft protection extended by a bank is no defense to a charge of insolvency or custodial account violations. *In re Thumb Auction Markets, Inc.*, *supra*; *In re Hugh B. Powell*, 41 A.D. 1354, 1360 (1982); *In re Sechrist Sales Co.*, 36 A.D. 665, 668, 670-75 (1977); *In re Harry Hardy*, 33 A.D. 1383, 1401 (1974). Similarly, over-draft protection cannot be a defense to a charge of issuing insufficient funds checks.

A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance or erroneous advice, or if the respondent acts with careless disregard of the statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185, 187 (1973); *Goodman v. Benson*, 286 F.2d 896, 900 (CA 7 1961); *In re Miller*, 33 A.D. 53, 83-87, *aff'd sub nom.*, *Miller v. Butz*, 498 F.2d 1088 (CA 5 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 A.D. 596, 609 (1968).

Here, the practices engaged in by respondent must be characterized as willful.

Respondent operated completely in the dark regarding the financial condition of his business. He maintained no record of his sales and hence did not know who owed him or how much he was owed. He relied solely on a credit arrangement with a bank to pay his overdrafts, and then sold the property which was the collateral for the credit arrangement. This state of affairs led to the respondent's failure to pay for livestock and his issuance of nonsufficient funds checks. At the very least respondent's actions and course of conduct were in careless disregard of the requirements of the Act.

On fourteen separate occasions, respondent issued checks in purported payment for livestock which were returned for nonsufficient funds in his account. In another fourteen transactions, respondent admits that he failed to give his sellers

payment for the livestock he purchased. The failure to pay promptly and in full for livestock and the issuance of "insufficient funds" checks have been held to violate Sections 312(a) and 409 of the Act. *Lewis v. Butz*, 512 F.2d 681, 682-83 (CA 8, 1975); *In re Bryan*, 36 A.D. 37, 42 (1977); *In re Mid-States Livestock, Inc.*, 37 A.D. 547, 561-562 (1977), *aff'd sub nom Van Wyk v. Bergland*, 570 F.2d 701, 704-705 (CA 8 1978); *In re Trenton Livestock, Inc.*, 41 A.D. 1965 (1982); *In re Edwards*, 37 A.D. 1880, 1887 (1978).

In addition, respondent admitted that as of September 30, 1984, his current liabilities exceeded his current assets and that as of the date of the filing of the complaint, his current liabilities also exceeded his current assets. Under the Act, the principal test of insolvency is whether current liabilities exceed current assets. This test has been reviewed and affirmed by the Fifth Circuit in *Bowman v. United States*, 363 F.2d 81 (CA 5 1966).

Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. *In re Hugh B. Powell, supra*, at 1359-1360; *In re Donald Hageman*, 42 A.D. 531, 539-540 (1983).

Because respondent was insolvent on September 30, 1984 and November 8, 1984, it is clear that he failed to meet the financial requirements of the Act. (7 U.S.C. § 204).

Sanction

Respondent does not contest the factual allegations of the complaint. His sole argument is directed to the proposed sanction sought by the complainant. The complainant requests that respondent be ordered to cease and desist from the practices alleged and that he be suspended for a period of two years and thereafter until he demonstrates his solvency.

Complainant urges at page 6 of its brief:

In 1976, Congress recognized the importance of assuring livestock producers prompt payment for the livestock they sell by amending the Packers and Stockyards Act to include section 409 (7 U.S.C. § 228b). This section,

which embodies the prompt payment provisions, was enacted to insure financial integrity in the livestock industry and to prevent economic disaster to livestock sellers (Tr. 10). So crucial is the requirement of prompt payment to the financial stability of the livestock industry, a cash basis industry, that Congress uniformly imposed it on all persons subject to the Act's jurisdiction.

The testimony at the oral hearing was unequivocal and extensive that due to the congressional mandate set forth above, the Packers and Stockyards Administration considers violation of the prompt payment provisions of section 409 to be very serious (Tr. 12, 13). Mr. Brinckmeyer testified that these practices are damaging to the individual market agency, dealer or producer who does not receive timely payment, and damaging to the industry as a whole. (Tr. 11).

Further, the Judicial Officer has held repeatedly that it is the policy of the Department to impose severe sanctions upon respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department. This policy has been adopted in order to serve as an effective deterrent to the respondent as well as to other potential violators. *In re Braxton M. Worsley*, 33 A.D. 1547, 1556-1561 (1974). The Judicial Officer has also stated that the recommendation of the administrative officials with respect to the sanction is to be given great weight since they administer the program on a daily basis and are in the best position for observing whether the sanctions imposed serve as an effective deterrent to future violations by respondents and others. *In re Worsley, supra*, at 1568.

In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances.

**ADDITIONAL CONCLUSIONS BY THE
JUDICIAL OFFICER**

The ALJ recognized the "enormity of the violations" (Initial Decision at 12), which "clearly warranted" the 2-year suspension order requested by complainant (Initial Decision at 11). Nonetheless, he held all but 30 days of the suspension period in abeyance for the following reasons (Initial Decision at 11-13):

In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances. At the same time, some consideration should be given to respondent's plea that an order be formulated permitting respondent to continue in the livestock industry with the safeguards that are presently in place. This I believe is possible within the framework of the sanction proposed by complainant.

A modification appears appropriate for several reasons. Respondent was not subject to prior suspensions nor was there any indication of an intent to defraud his creditors. His faults lay in his failure to establish good accounting practices and blind reliance of a credit arrangement with his bank. These failings appear to be remedied through his present arrangement with his employer, Elden Ginn (Findings 13 and 14, and respondent's Exhibit 1). Further, under such arrangement, respondent's creditors receive a token repayment of the indebtedness. (Findings 14, 15). While such payment is no defense to the violations of the Act (complainant's main brief, page 5), it represents a good faith attempt to repay his indebtedness.

Under the order as contained herein, respondent is suspended as a registrant for two years and thereafter until he demonstrates that he is no longer insolvent, as complainant recommends. However, after a 30-day period of suspension (the enormity of the violations re-

quires at least an initial 30-day suspension) the remainder of the two-year suspension is suspended for so long as respondent remains in the employ of Elden Ginn in accordance with the present arrangement contained in the record. Should such arrangement terminate after a three-month period, for example, the remaining 20 months of the 2-year suspension of registration would become effective. If after expiration of the two-year period, respondent can demonstrate he is no longer insolvent, a supplemental order will be issued terminating the suspension.

The order herein will serve as an effective deterrent to future violations by respondent and others, and at the same time permit respondent's employment in an endeavor in which he has worked all of his life.

I could not disagree more with the ALJ's views! The ALJ's sanction is a "slap on the wrist" which would encourage, rather than discourage, respondent and others to engage in similar reckless conduct costing livestock sellers hundreds of thousands of dollars.

The admitted facts show that as of the date of the hearing (September 18, 1985), respondent still had not paid for at least \$700,000 worth of livestock purchased during a 3-week period in September 1984 (Findings 5-7). Respondent's exhibits show that during August and September 1984, his checking account was in an overdrawn (or negative) position on only one day, *viz.*, on August 17, 1984 his checking account was overdrawn in the amount of \$10,720.20 (RX 3, 4). Since respondent was actually broke in September 1984 (*i.e.*, he was in the red by nearly a million dollars), I infer that he was "robbing Peter to pay Paul." That is, respondent was delaying making payment for livestock purchased from A until he had bought livestock from B, received payment for B's livestock, and then used the money from B's livestock to pay A.

Furthermore, the undisputed evidence gives rise to the inference that respondent had been engaging in that practice

for a considerable period of time. Respondent admittedly began selling livestock on a grade and yield basis in 1982 or 1983, and he continued operating until September 1984, when the bank withdrew his line of credit.² He explained that he bought animals on a live weight basis, e.g., paying \$500 for an animal, and sold it on a dressed weight basis. He would call the packer on a given day and the packer would tell him what price would be paid for choice cattle delivered at the plant the following day. Respondent would then purchase the livestock himself (or through the 15 buyers purchasing livestock for him on a commission basis) on a live weight basis, and sell it on a grade and yield basis. If he or the other buyers estimated incorrectly the grade that would be determined after slaughter or the number of dressed weight pounds that would be produced from the livestock, respondent would likely lose money on the transaction. Since respondent lost about \$700,000 from his grade and yield transactions, either he and his buyers were very inept at buying livestock that would be profitable at the price being paid by the packer, or he was taking too much profit from the business. (For our purposes, it makes no difference which explanation is correct.)

Although respondent was admittedly a very poor bookkeeper, and kept no accounts receivable records, he took all of his records to his bookkeeper once a month. No matter how poor respondent's bookkeeping system was, it would not be possible for him to be short \$700,000 without knowing that he was operating in the red. Accordingly, I infer that respondent knew for a considerable period of time that he was operating in a manner that exposed the persons selling livestock to him to great risk.³ Cf. *Zwick v. Freeman*, 373 F.2d 110, 115 (2d

² The bank's action in withdrawing respondent's line of credit did not cause his loss of at least \$700,000, but merely exposed his insolvent condition.

³ Respondent was not asked whether he knew that he had been operating in the red for a considerable period of time. He testified that he assumed that the bank would continue to honor overdrafts, but, as stated above, he

Cir.), *cert. denied*, 389 U.S. 835 (1967), in which the court said with respect to a failure to pay case under the Perishable Agricultural Commodities Act:

As there was a series of 295 transactions which occurred over a period of several months and which involved a deficit in excess of a quarter of a million dollars, it is inconceivable that petitioners were unaware of their financial condition and unaware that every additional transaction they entered into was likely to result in another violation of the Commodities Act. It would be hard to imagine clearer examples of "flagrant" violations of the statute than were exemplified by petitioners' conduct.

If, on the other hand, respondent were to contend that he was totally oblivious to the fact that he was operating heavily in the red, when, in fact, he was short approximately \$700,000 in his livestock business, that would be such reckless conduct that it would demonstrate a total lack of regard for the legislative requirements that he pay promptly and in full for his livestock purchases.

Hence under any view of the situation, respondent's failures to pay for over \$700,000 worth of livestock constitute flagrant violations of the Act warranting a most severe sanction.

It is the policy of this Department to impose severe sanctions for serious or repeated violations of any of the regulatory programs administered by the Department to serve as an effective deterrent not only to the respondents, but also to other potential violators. This policy has been followed in all of the Department's disciplinary proceedings since the early 1970's.

The basis for the Department's severe sanction policy is set forth at great length in numerous decisions, *e.g.*, *In re*

was depositing enough money into his checking account from his livestock sales so that his account was overdrawn on only one day during August and September 1984, even though he was at least \$700,000 in the red at the time.

Worsley, 33 Agric. Dec. 1547, 1556-71 (1974)⁴ which is set forth as an Appendix to this decision.⁵ The Department's sanction policy is also discussed at length in *In re Esposito*, 38 Agric. Dec. 613, 624-65 (1979).

Respondent's failure to pay for about \$700,000 worth of livestock fully justifies the 2-year suspension order requested by complainant. It should be noted that there has been a drastic change in complainant's sanction policy with respect to failure to pay violations in recent years. For many years, a

⁴ The Department's severe sanction policy did not originate with Worsley, but, rather, was mentioned briefly in the first decision issued by the present Judicial Officer, *In re Henner*, 30 Agric. Dec. 1151, 1263-64 (1971), and was further developed in numerous other decisions before it was finalized in *In re Miller*, 33 Agric. Dec. 53, 64-80 (1974), *aff'd per curiam*, 498 F.2d 1088 (5th Cir. 1974).

⁵ Severe sanctions issued pursuant to the Department's severe sanction policy were sustained, e.g., in *In re Collier*, 38 Agric. Dec. 957, 971-72 (1979), *aff'd per curiam*, 624 F.2d 190 (9th Cir. 1980) (unpublished); *In re Gold Bell-I&S Jersey Farms, Inc.*, 37 Agric. Dec. 1336, 1362-63 (1978), *aff'd*, No. 78-3134 (D.N.J. May 25, 1979), *aff'd mem.*, 614 F.2d 770 (3d Cir. 1980); *In re Muehlenthaler*, 37 Agric. Dec. 313, 330-32, 337-52, *aff'd mem.*, 590 F.2d 340 (8th Cir. 1978); *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547, 549-51 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1133-34 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1561 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 31-32 (1976), *aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re Maine Potato Growers, Inc.*, 34 Agric. Dec. 773, 796, 801 (1975), *aff'd*, 540 F.2d 518 (1st Cir. 1976); *In re M. & H. Produce Co.*, 34 Agric. Dec. 700, 750, 762 (1975), *aff'd*, 549 F.2d 830 (D.C. Cir.) (unpublished), *cert. denied*, 434 U.S. 920 (1977); *In re Southwest Produce, Inc.*, 34 Agric. Dec. 160, 171, 178, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re J. Acevedo & Sons*, 34 Agric. Dec. 120, 133, 145-60, *aff'd per curiam*, 524 F.2d 977 (5th Cir. 1975); *In re Marvin Tragash Co.*, 33 Agric. Dec. 1884, 1913-14 (1974), *aff'd*, 524 F.2d 1255 (5th Cir. 1975); *In re Trenton Livestock, Inc.*, 33 Agric. Dec. 499, 515, 539-50 (1974), *aff'd per curiam*, 510 F.2d 966 (4th Cir. 1975) (unpublished); *In re Miller*, 33 Agric. Dec. 53, 64-80, *aff'd per curiam*, 498 F.2d 1088, 1089 (5th Cir. 1974).

person who deprived a livestock seller of 1% of the value of his livestock by false weighing would be given a more severe sanction than a person who deprived the livestock seller of 100% of the value of his livestock by failing to pay for the livestock. In the latter case, a 30-day suspension order was typical. (I inherited that policy and did not change it during the period I was administrator of the Packers and Stockyard Act regulatory program.)

I suggested a drastic change in that policy in *In re Mid-States Livestock, Inc.*, 37 Agric. Dec. 547 (1977), *aff'd sub nom. Van Wyk v. Bergland*, 570 F.2d 701 (8th Cir. 1978). In that case, livestock sellers lost over half a million dollars because respondents took money from their livestock business, which was needed to pay sellers, and lost it gambling on the commodity futures market (37 Agric. Dec. at 550). Complainant recommended the usual 30-day "slap on the wrist" suspension order, which was imposed by the ALJ. When *respondent* appealed, I *sua sponte* raised the issue as to whether the sanction should be increased on appeal, and suggested in an order requesting additional briefs that a 5-year suspension order seemed appropriate. In imposing a 60-day suspension order in that case, it is stated (37 Agric. Dec. at 550-51):

Just last year Congress indicated its concern that livestock producers be paid for their livestock by the enactment of amendments to the Packers and Stockyards Act which impose payment requirements even more stringent than those previously imposed by the regulations issued under the Act (Public Law 94-110, 94th Cong., 2nd Sess.; 90 Stat. 1249). In the House Report on the bill relating to these amendments, it is stated (H. Rep. No. 94-1043, 94th Cong., 2nd Sess., p. 5; see, also, Sen. Rep. No. 94-932, 94th Cong., 2nd Sess., pp. 5-6):

USDA figures show that in 1973 some \$31 billion worth of livestock and \$4 billion worth of poultry were marketed in the United States, representing approximately one-third of all farm income.

Livestock is probably the single most important source of protein in the American diet. Thus, livestock producers occupy a position of unique national importance. No individual is engaged in a riskier endeavor or one more vital to the national interest than the producer. And no entrepreneur is so completely at the mercy of the marketplace. The livestock producer, if he successfully combats the vicissitudes of weather, financing, skyrocketing costs, etc., must sell when his cattle are ready irrespective of the market. His livestock may represent his entire year's output. And, if he is not paid, he faces ruin. While some may argue that business is business and that farmers must take their chances along with everyone else, this Committee must view the situation from a larger perspective. We would be derelict in our responsibilities to the American people if we failed to address the evils which have inflicted heavy losses upon the very producers upon whom the Nation depends for such an important part of its basic food supply.

In two recent cases involving failure to pay for about \$766,000.00 and \$3.2 million dollars worth of livestock, respectively (*In re Robert L. Benefiel*, 32 Agr Dec 1684 (1973); *In re James L. Heller*, 34 Agr Dec 1563 (1975)), respondents were suspended for five years. Although these cases are not weighty precedents because one is a consent case and the other a default case, they show, nonetheless, that a 5-year suspension order is at least regarded as appropriate in some failure to pay cases. I believe that the respondents' failure to pay over half a million dollars in the present case warrants a similar 5-year suspension order, particularly since the respondents took the money from their successful livestock business to finance their gambling ventures.

Under a similar regulatory program administered by the Department involving perishable agricultural com-

modities, a violator's license is routinely revoked for failing to pay a significant amount of money for produce, even where such failure is because of legitimate business losses. See, e.g., *In re Reese Sales Company*, 28 Agr Dec 1150 (1969), affirmed *sub nom. Reese Sales Company v. Hardin*, 458 F.2d 183 (C.A. 9); *In re Sam Leo Catanzaro*, 35 Agr Dec 26 (1976), [*aff'd*, No. 76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467 (1977)].⁶ A

⁶ *Accord In re B.G. Sales Co.*, 44 Agric. Dec. ____ (Oct. 9, 1985) (nonpayment because bank suddenly refused to extend credit as it agreed, and the bank took \$50,000 of respondent's funds in the bank's possession); *In re Jarosz Produce Farms, Inc.*, 42 Agric. Dec. ____ (Oct. 6, 1983) (nonpayment because of bankruptcy caused by failure of large purchaser from respondent to comply with its contractual agreement); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151 (1983) (nonpayment because another firm failed to pay respondent \$248,805.66); *In re Bananas, Inc.*, 42 Agric. Dec. 588 (1983) (nonpayment because of a major customer's insolvency, the failure of other debtors to pay respondent, and increased operating costs); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2428, 2442-44 (1982) (nonpayment because of bankruptcy), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Finer Foods Sales Co.*, 41 Agric. Dec. 1154, 1171 (1982) (nonpayment because of bankruptcy), *aff'd*, 708 F.2d 774 (D.C. Cir. 1983); *In re Carlton F. Stowe, Inc.*, 41 Agric. Dec. 1116, 1129 (1982) (nonpayment because of bankruptcy of another firm owing respondent \$776,459.23), *appeal dismissed*, No. 82-4144 (2d Cir. Oct. 13, 1982); *In re V.P.C., Inc.*, 41 Agric. Dec. 734, 746-47 (1982) (nonpayment because of financial difficulties); *In re Connecticut Celery Co.*, 40 Agric. Dec. 1131, 1138-40 (1981) (nonpayment because respondent suddenly and unexpectedly lost a major sales account); *In re United Fruit & Vegetable Co.*, 40 Agric. Dec. 396, 404 (1981) (nonpayment because of financial difficulties), *aff'd*, 668 F.2d 983 (8th Cir.), *cert. denied*, 456 U.S. 1007 (1982); *In re Columbus Fruit Co.*, 40 Agric. Dec. 109, 113 (1981) (nonpayment because respondent lost a major sales account and a large supplier changed its course of dealing with respondent, demanding cash on delivery), *aff'd mem.*, No. 81-1446 (D.C. Cir. Jan. 19, 1982), *printed in* 41 Agric. Dec. 89 (1982); *In re Kafcsak*, 39 Agric. Dec. 683, 685-86 (1980) (nonpayment because of strike and failure of others to pay respondent), *aff'd*, 673 F.2d 1329 (6th Cir. 1981) (unpublished), *printed in* 41 Agric. Dec. 88 (1982); *In re John H. Norman & Sons Distrib. Co.*, 37 Agric. Dec. 705, 709-14 (1978) (nonpayment because of failure of others to pay respondent); *In re Catanzaro*, 35 Agric. Dec. 26, 31 (1976) (nonpayment because of railroad strike), *aff'd*, No.

revoked licensee may not apply for a new license for two years. 7 U.S.C. 499d(b).

Although I believe the violations in this case warrant a 5-year suspension order to serve as an effective deterrent to future similar violations, the complainant, in the oral argument before the Judicial Officer, recommended only a 60-day suspension order. Since it is the policy of the Judicial Officer "never to increase the sanction recommended by the administrative officials" (see Appendix, p. 21a), a 60-day suspension order will be issued rather than a 5-year suspension order.

Subsequent to the decision in *Mid-States*, just quoted, the Judicial Officer overruled that portion of the Department's sanction policy which precluded him from imposing a sanction greater than that recommended by the administrative officials (*In re Rowland*, 40 Agric. Dec. 1934, 1952 (1981), *aff'd*, 713 F.2d 179 (6th Cir. 1983)). Accordingly, if *Mid-States* were to be decided today, a 5-year suspension order would be issued.

76-1613 (9th Cir. Mar. 9, 1977), *printed in* 36 Agric. Dec. 467; *In re George Steinberg & Son, Inc.*, 32 Agric. Dec. 236, 266-68 (1973) (nonpayment because of financial difficulties), *aff'd*, 491 F.2d 988 (2d Cir.), *cert. denied*, 419 U.S. 830 (1974); *accord In re Wayne Cusimano, Inc.*, 40 Agric. Dec. 1154, 1157 (1981) (nonpayment because of financial difficulties, including difficulty in collecting from others), *aff'd*, 692 F.2d 1025 (5th Cir. 1982); *In re C.B. Foods, Inc.*, 40 Agric. Dec. 961 (1981) (nonpayment because respondent lost a major sales account and three large suppliers would no longer extend credit), *aff'd mem.*, 681 F.2d 804 (3d Cir.), *cert. denied*, 459 U.S. 831 (1982); *In re Atlantic Produce Co.*, 35 Agric. Dec. 1631, 1632-33, 1641-42 (1976) (nonpayment because of financial difficulties), *aff'd per curiam*, 568 F.2d 772 (4th Cir.) (unpublished), *cert. denied*, 439 U.S. 819 (1978); *In re Solt*, 35 Agric. Dec. 721, 723-24 (1976) (nonpayment because of bankruptcy of another firm owing respondent over \$130,000); *In re King Midas Packing Co.*, 34 Agric. Dec. 1879, 1883, 1885 (1975) (nonpayment because of financial difficulties); *In re Bailey Produce Co.*, 8 Agric. Dec. 1403, 1405 (1949) (nonpayment because of financial difficulties); *In re Josie Cohen Co.*, 3 Agric. Dec. 1013, 1015 (1944) (nonpayment because of financial difficulties).

The ALJ felt that it would be desirable to permit respondent to continue in the livestock industry with the safeguards that are presently in place. I disagree! It is not desirable to permit respondent to continue in the livestock industry since that would seriously undercut the deterrent value of the administrative sanction imposed in this case. It would encourage respondent and others to act in a similar irresponsible manner in the future, greatly endangering livestock sellers.

The ALJ also indicated that under the proposed arrangement to permit respondent to remain in the livestock business during all but 30 days of the 2-year suspension period, respondent's creditors could receive a "token" repayment of the indebtedness. However, that argument has routinely been rejected in determining sanctions imposed by this Department. It has consistently been held that any hardship to the respondent's creditors, customers, community, or employees which might result from a suspension order is given no weight in determining the sanction since the national interest of having fair and competitive conditions in the livestock and meat industries prevails over the local interests that might be damaged as a result of a suspension order.⁷

⁷ *In re Blackfoot Livestock Comm'n Co.*, 45 Agric. Dec. ____ (Mar. 7, 1986), appeal docketed, No. 86-7198 (9th Cir. Apr. 16, 1986); *In re Gilardi Truck & Transp., Inc.*, 43 Agric. Dec. ____ (Jan. 27 1984); *In re Oliverio, Jackson, Oliverio, Inc.*, 42 Agric. Dec. 1151, 1172 (1983); *In re Bananas, Inc.*, 42 Agric. Dec. 588, 606 (1983); *In re Melvin Beene Produce Co.*, 41 Agric. Dec. 2422, 2441-42 (1982), *aff'd*, 728 F.2d 347 (6th Cir. 1984); *In re Powell*, 41 Agric. Dec. 1354, 1365 (1982); *In re VPC, Inc.*, 41 Agric. Dec. 734, 746 n.6 (1982); *In re Hatcher*, 41 Agric. Dec. 662, 670-71 (1982); *In re Gus Z. Lancaster Stock Yards, Inc.*, 38 Agric. Dec. 824, 825 (1979); *In re Sol Salins, Inc.*, 37 Agric. Dec. 1699, 1737-38 (1978); *In re Arab Stock Yard, Inc.*, 37 Agric. Dec. 293, 302, 311, *aff'd mem.*, 582 F.2d 39 (5th Cir. 1978); *In re Cordele Livestock Co.*, 36 Agric. Dec. 1114, 1128-29, 1136 (1977), *aff'd per curiam*, 575 F.2d 879 (5th Cir. 1978) (unpublished); *In re Red River Livestock Auction, Inc.*, 36 Agric. Dec. 980, 989-90 (1977); *In re Livestock Marketers, Inc.*, 35 Agric. Dec. 1552, 1562 (1976), *aff'd per curiam*, 558 F.2d 748 (5th Cir. 1977), *cert. denied*, 435 U.S. 968 (1978); *In re Catanzaro*, 35 Agric. Dec. 26, 34-35 (1976), *aff'd*, No. 76-1613 (9th Cir.

For the foregoing reasons, the following order should be issued.

Order

Respondent Richard N. Garver, his agents and employees, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to pay the checks when presented;
2. Failing to pay, when due, the full purchase price of livestock; and
3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for 2 years and thereafter until such time as he demonstrates that he is no longer insolvent. When the respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after expiration of the 2-year period.

The cease and desist provisions of this order shall become effective on the day after service of this order on respondent. The suspension provisions shall become effective on the 30th day after service on respondent.

Done at Washington, D.C.

June 19, 1986

/s/ DONALD A. CAMPBELL

Judicial Officer

Office of the Secretary

Mar. 9, 1977), printed in 36 Agric. Dec. 467 (1977); *In re Overland Stockyards, Inc.*, 34 Agric. Dec. 1808, 1851-52 (1975); and see *In re L.R. Morris Produce Exch., Inc.*, 37 Agric. Dec. 1112, 1120-21 (1978); *In re Armour & Co.*, 37 Agric. Dec. 109, 112 (1978).

APPENDIX TO DECISION AND ORDER

Excerpt from *In re Worsley*, 33 Agric. Dec. 1547, 1556-71 (1974).

U.S.D.A. Sanction Policy

It is the policy of the Department to impose severe sanctions upon respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department.

The imposition of a severe, administrative sanction is never a pleasant task. A license suspension or revocation order prevents a person from engaging in his chosen business for a specified period, or permanently. This can cause great hardship, not only to the individual violator, but to his family, employees, and customers.

It is much easier and more pleasant to be "charitable" to the violator, putting more emphasis on his needs than the needs of society. The noted German philosopher Nietzsche observed almost a century ago:

There is a point in the history of society when it becomes so pathologically soft and tender that among other things it sides even with those who harm it, criminals, and does this quite seriously and honestly. Punishing somehow seems unfair to it, and it is certain that imagining "punishment" and "being supposed to punish" hurts it, arouses fear in it. "Is it not enough to render him *undangerous*? Why still punish? Punishing itself is terrible."¹

Similarly, in administering regulatory programs, there is a danger that the agency may become so "pathologically soft and tender" that it fails to achieve the purpose of the legislators who enacted the remedial statutes.

¹ Nietzsche, *Beyond Good and Evil* (1886; Kaufmann Trans., 1966), § 201, p. 114.

Since the Department of Agriculture administers approximately 50 regulatory statutes—more than any other agency—it is important that the Department administer the statutes in a manner to achieve the Congressional purposes.

The sanction policy that has been followed in the Department's administrative, disciplinary proceedings decided in the last two years is set forth at length below. Most of this language is taken verbatim from prior decisions. See, *e.g.*, *In re George Rex Andrews*, 32 Agriculture Decisions 553, 563-583 (1973); *In re American Commodity Brokers*, 32 Agriculture Decisions 1765, 1799 (1973); *In re James J. Miller*, 33 Agriculture Decisions 53, 64-80 (1974), affirmed *sub nom. Miller v. Butz*, ____ F.2d ____ (C.A. 5), decided August 8, 1974; *In re J. A. Speight*, 33 Agriculture Decisions 280, 318 (1974).

The administrative proceeding in this case does not partake of the essential qualities of a criminal proceeding. In permitting a person to engage in a Federally regulated business, the Government has, in effect, granted him a privilege. Suspension of the privilege for failure to comply with the statutory standard "is not primarily punishment for a past offense but is a necessary power granted to the Secretary of Agriculture to assure a proper adherence to the provisions of the Act." *Nichols & Co. v. Secretary of Agriculture*, 131 F.2d 651, 659 (C.A. 1). Accord: *Helvering v. Mitchell*, 303 U.S. 391, 399; *Kent v. Hardin*, 425 F.2d 1346, 1349 (C.A. 5); *Blaise D'Antoni & Associates, Inc. v. Securities & Exch. Com'n*, 289 F.2d 276, 277 (C.A. 5), certiorari denied, 368 U.S. 899; *Eastern Produce Co. v. Benson*, 278 F.2d 606, 610 (C.A. 3); *Cella v. United States*, 208 F.2d 783, 789 (C.A. 7), certiorari denied, 347 U.S. 1016; *Irving Wells & Co. v. Brannan*, 171 F.2d 232, 235 (C.A. 2); *Nelson v. Secretary of Agriculture*, 133 F.2d 453, 456 (C.A. 7); *Board of Trade of City of Chicago v. Wallace*, 67 F.2d 402, 407 (C.A. 7), certiorari denied, 291 U.S. 680; and *Farmers' Livestock Commission Co. v. United States*, 54 F.2d 375, 378 (E.D. Ill.). See, also, *Ex Parte Wall*, 107 U.S. 265, 287-290; *Hawker v. New York*, 170 U.S. 189, 190-200; *Steuart & Bro. v. Bowles*, 322 U.S. 398, 406-407;

Brown v. Wilemon, 139 F.2d 730, 731-732 (C.A. 5); Chamberlain, Dowling, and Hays, *The Judicial Function in Federal Administrative Agencies* (1942), pp. 93-95.

The function of an administrative sanction is "deterrence rather than retribution" (Schwenk, "The Administrative Crime, Its Creation and Punishment by Administrative Agencies," 42 *Mich. L. Rev.* (1943) 51, 85).

Under the foregoing authorities, the sanction should, *inter alia*, be adequate to deter the respondents from future violations.

In *Beck v. Securities and Exchange Commission*, 430 F.2d 673, 675 (C.A. 6), the Court questioned, without deciding, whether a suspension order may also be used to deter others in the regulated industry from committing similar violations. As far as I know, this is the only case in which the use of an administrative sanction to deter others has been questioned. Previously, the use of an administrative sanction to deter others had been assumed to be proper. See, e.g., *American Air Transport and Flight School, Inc., Enforcement Proceeding*, 2 Pike & Fischer Ad. L. 2d 213, 215 (C.A.B.). See, also, the dissenting opinion in *Beck v. Securities and Exchange Commission*, 413 F.2d 832, 834 (C.A. 6).

In cases arising under the Civil Aeronautics Act, it has been expressly held that the Civil Aeronautics Board has the power to "impose a suspension as a 'sanction' against specific conduct or because of its 'deterrence' value — either to the subject offender or to others similarly situated." *Pangburn v. C.A.B.*, 311 F.2d 349, 354 (C.A. 1). Accord: *Hard v. Civil Aeronautics Board*, 248 F.2d 761, 763-765 (C.A. 7), certiorari denied, 355 U.S. 960; *Wilson v. Civil Aeronautics Board*, 244 F.2d 773, 773-774 (C.A. D.C.), certiorari denied, 355 U.S. 870.

The remedial provisions of a regulatory program would be drastically affected if the agency could consider the effect of sanctions only on the respondents and not on others. It is well recognized that persons regulated by a governmental agency keep abreast of administrative proceedings. The actions of potential violators could be significantly affected by the sanc-

tions imposed against other persons. Eight years' experience in the administration of a regulatory program has convinced me that it is necessary to consider, as a major factor, the effect of a sanction in a particular case not only on the violator, but on other potential violators, as well.

Socrates recognized that "the proper office of punishment is two-fold: he who is rightly punished ought either to become better and profit by it, or he ought to be made an example to his fellows, that they may see what he suffers, and fear and become better."²

Similarly, Plato said that no man is to be punished "because he did wrong, for that which is done can never be undone, but in order that, in the future times, he, and those who see him corrected, may utterly hate injustice, or at any rate abate much of their evil-doing."³

The deterrent effect of punishment of one violator on potential violators is recognized in Deuteronomy 13:10-11 (R.S.V.; see also, Deuteronomy 19:19-20), as follows:

You shall stone him to death with stones * * *. And all Israel shall hear, and fear, and never again do any such wickedness as this among you.

In the field of criminal law, it is settled beyond question that one of the primary purposes of the penalty imposed on a particular violator is to deter other potential violators.

* * * punishment, in this context [*i.e.*, "general prevention"], is used not to prevent future violations on the part of the criminal, but in order to instill lawful behavior in others.⁴

* * * deterrence * * * is aimed at the protection of

² Encyclopaedia Britannica, *The Great Ideas: A Syntopicon of Great Books of the Western World* (Vol. II, 1952), pp. 492-493.

³ *Id.* at 492.

⁴ Andenaes, "The General Preventive Effects of Punishment," 114 *University of Pennsylvania Law Review* (1966), 949, 982.

society. By making a certain action a punishable offense, we expect that people will refrain from committing the offense through fear of punishment. * * *

The purpose of punishment as a deterrent * * * is also to demonstrate to the potential offender the consequences if he violates the law.⁵

* * * the deterrent value of a correctional system is not restricted to those who come into direct contact with it but applies to the whole population.⁶

* * * it is a primarily preventive consideration — having an eye to what is necessary to keep the people reasonably law-abiding — which today's legislators have in mind, too, when they define crimes and stipulate punishments.⁷

* * * *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, * * * regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of us are potential criminals.⁸

The purpose of punishment, be it a criminal sentence, a civil penalty, or punitive damages, is not to inflict suffering or to impose a loss on the offender. Its object is to act as a deterrent: first to discourage the offender himself from repeating his transgression; and, second, to deter others from doing likewise.⁹

⁵ Gardiner, "The Purposes of Criminal Punishment," 21 *Modern Law Review* (1958), 117, 121.

⁶ Gould and Namenwirth, "Contrary Objectives: Crime Control and the Rehabilitation of Criminals," in *Crime and Justice in American Society* (1971), 237, 246.

⁷ Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 177.

⁸ Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 182.

⁹ *Collins v. Brown*, 268 F. Supp. 198, 201 (D.C. D.C.).

Sentencing is * * * an exacting task in which the Court undertakes to * * * impose a sentence which will best protect society, deter others and punish * * * the offender.¹⁰

More controversial but certainly no less important [than deterrence of the individual violator] is the need for *deterrence*, "general prevention," of potential criminals who may be dissuaded from crime by the threat and the administration of penalties.¹¹

* * *

Penalties are not provided as punishment for the individual who has gone wrong. Their imposition is alone justified for the effect the punishment may have upon the convict in preventing him from continuance in crime and in teaching him that "the way of the transgressor is hard." But the still greater effect to be attained is the deterrent effect the sentence may have upon those who may be inclined to follow the criminal course upon which the convict has embarked.¹²

* * * deterrence looks primarily at the potential criminal outside the dock [of the courtroom] * * *.¹³

Punishment can protect society by deterring potential offenders * * *.¹⁴

* * * the greater the penalty, the "higher the costs associated with criminal activity," and the higher these costs, the fewer crimes committed.¹⁵

¹⁰ *United States v. Mandracchia*, 247 F. Supp. 1, 4 (D.N.H.).

¹¹ Tappan, *Crime, Justice and Correction* (1960), p. 243.

¹² *Id.* at 243, fn. 5, quoting from *People v. Gowasky*, 219 App. Div. 19, 24, 25, 219 N.Y.S. 373, 380, affirmed, 244 N.Y. 451, 155 N.E. 737.

¹³ Fitzgerald, *Salmond on Jurisprudence* (12th ed., 1966), § 15, p. 94.

¹⁴ *Ibid.*

¹⁵ Berns, "Justified Anger: Just Retribution," *Imprimis* (Vol. 3, No. 6, June 1974), p. 3.

One of these goals [of law] is deterrence by means of punishment. We punish in order to deter people from engaging in the undesirable conduct which we call crime.

* * * deterrence, addresses itself * * * both to the individual himself—we hope he will be deterred in the future—and to the entire community.¹⁶

Perhaps the most salient authority for the proposition that one of the primary ends of punishment is to serve as a deterrent to other potential violators is Chief Justice William Howard Taft's statement written in 1928:

* * * the chief purpose of the prosecution of crime is to punish the criminal and to deter others tempted to do the same thing from doing it because of the penal consequences.¹⁷

Johannes Andenaes, a leading authority from the University of Oslo, makes the same point, as follows: "From the point of view of sheer logic one must say that general prevention — *i.e.*, assurance that a minimum number of crimes will be committed — must have priority over special prevention — *i.e.*, impeding a particular criminal from future offenses."¹⁸

In other words, it is more important to the general welfare of society to consider the effect that a sanction will have on other potential violators than to consider the sanction needed to prevent the particular individual from again violating the law. In fact, it is not uncommon to have certain types of offenses committed where "there will practically never be an

¹⁶ Puttkammer, *Administration of Criminal Law* (1953), 8.

¹⁷ Menninger, *The Crime of Punishment* (1968), 194. The original statement of Chief Justice Taft's position appeared in his article, "Toward a Reform of the Criminal Law," in *The Drift of Civilization* (1929).

¹⁸ Andenaes, "The General Preventive Effects of Punishment," 114 *University of Pennsylvania Law Review* (1966), 949, 952.

individual preventive need for punishment" and yet punishment "is necessary for general prevention."¹⁹

Whether punishment achieves the objective of deterring others from violating the law is questioned by some authorities,²⁰ but affirmed by many others.

As an argument for the abolition of the deterrent doctrine, it is often maintained that neither the threat nor application of penalties does prevent crime. This position reflects the simplistic notion, too commonly prevailing in matters of social action, that nothing has been achieved merely because not everything is accomplished that we should like. It is sometimes said that high crime rates

¹⁹ Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 196.

²⁰ See, e.g., Menninger, *The Crime of Punishment* (1968), preface, viii, and pp. 9, 108, 113, 206-208. However, even though Menninger believes that our present system of punishing criminals is a "crime" (*id.* at 28, 86, 280), he favors "penalties" for violators. He states (*id.* at 202-203):

Certainly the abolition of punishment does not mean the omission or curtailment of penalties; quite the contrary. Penalties should be greater and surer and quicker in coming. I favor stricter penalties for many offenses, and more swift and certain assessment of them.

But these are not *punishments* in the sense of long-continued torture—pain inflicted over years for the sake of inflicting pain. If I drive through a red light, I will be and should be penalized.

• • •

If we disregard traffic signals we are penalized, not punished. If our offense was a calculated "necessity" in an emergency, then the fine is the "price" of the exception.

• • •

All legal sanctions involve penalties for infraction. But the element of punishment is an adventitious and indefensible *additional* penalty; it corrupts the legal principle of *quid pro quo* with a "moral" surcharge. Punishment is in part an attitude, a philosophy. It is the deliberate infliction of pain in addition to or in lieu of penalty. It is the prolonged and excessive infliction of penalty, or penalty out of all proportion to the offense.

prove that sanctions do not deter or that penalties actually invite the crimes of men who seek punishment to dissolve their feelings of guilt. With tiresome frequency the illustration is cited of the pickpockets who actively plied their trade in the shadow of the gallows from which their fellow knaves were strung. These assertions have a superficial relevance but they do not dispose of the issue by any means.

Persons with a will to believe in the efficacy of an exclusively individualistic and positivistic correctional system often quote the words of Warden Kirchwey. His patent oversimplifications of man's behavioral motivations should be noted, for this sort of loose thinking and naive criminological idealism pervert the ends of correction.

* * *

It is true, certainly, that the Classical doctrine of deterrence appears crudely oversimple in the light of modern conceptions of human behavior. In terms of reasonable goals for today it proposed to accomplish both too much and too little. This doctrine of deterrence was substantially more sound, however, than the position taken by those who deny any preventive effect to criminal sanctions. It is maintained here that the penal law and its application do in fact deter; indeed, with the declining efficacy of other forms of social control, it must be relied upon increasingly to maintain standards of behavior that are essential to the survival and security of the community. A complete failure of legal prevention cannot be inferred from the serious crimes committed by a small per cent of the population any more than can its success by the law obedience of the great preponderance of men. The matter is not so simple.²¹

* * * [as to studies] indicating that the death penalty is ineffective as a deterrent to murder, their very broad

²¹ Tappan, *Crime, Justice and Correction* (1960), pp. 245, 246.

interpretation has rendered a disservice to the more general issue of punishment as a deterrent to all kinds of criminal behavior. Such an expansive conclusion is obviously not justified since murder is, in many ways, a unique kind of offense often involving very strong emotions.²²

* * *

It is naive to suppose that punishment exists in a vacuum and is unrelated to the specific kinds of acts and the meaning which the punishment has for the actor.²³

The sanctions do, in fact, serve as a deterrent to "white-collar" violations is evidenced by a number of studies.

As Sutherland's analysis of white-collar crime has shown, violators of the Sherman Antitrust law are relatively free from criminal prosecution, though the imposition of punishment would be *maximally effective* with this type of offense.²⁴

*An intensive study of parking violators indicates that * * * an increase in the severity and certainty of punishment does act as a deterrent to further violation. These findings suggest the necessity for a reappraisal of current thinking. Studies demonstrating the ineffectuality of punishment as a deterrent to certain types of offenses should not be interpreted to mean that punishment is ineffective in deterring all types of offenses.*²⁵

²² Chambliss, "The Deterrent Influence of Punishment," 12 *Crime & Delinquency* (1966), 70, 71.

²³ *Id.* at 75.

²⁴ Chambliss, "Types of Deviance and the Effectiveness of Legal Sanctions," 1967 *Wisconsin Law Review* 703, 716 (emphasis supplied).

²⁵ Chambliss, "The Deterrent Influence of Punishment," 12 *Crime & Delinquency* (1966), 70.

Since one of the main purposes of a criminal law sentence is to deter other potential violators from committing similar violations, it follows, *a fortiori*, that one of the main purposes of an administrative law sanction is to deter other potential violators. In criminal law, "[r]etribution or social retaliation, though persistently criticized by modern advocates of a progressive penology, continues to be a major ingredient of our penal law and of our correctional system."²⁶ "The principle of retribution was formulated in the *lex talionis*, the Mosaic doctrine expressed in *Deuteronomy*, 19:21: 'Thine eye shall not pity, but life shall go for life, eye for eye, tooth for tooth, hand for hand, foot for foot.'"²⁷ But retribution or social retaliation is not one of the objectives of administrative sanctions — they are to "assure a proper adherence to the provisions of the Act" (*Nichols & Co. v. Secretary of Agriculture, supra*). Hence deterrence — both as to the individual violator, and as to other potential violators — is the primary, if not the only, objective of an administrative sanction.

To serve as an effective deterrent to potential violators of a regulatory statute, I believe that administrative sanctions should be severe; sanctions which are too lenient, rather than being a deterrent, will serve as a catalyst for violations by others. Not all criminologists, sociologists, or jurists share this view; but many noted authorities do.

Since the power of a legal threat to function as a simple deterrent comes from the unpleasantness of the consequences threatened, one natural strategy for increasing the deterrent efficacy of threats is to increase the severity of threatened consequences. The theory of increased penalties as a marginal deterrent is simple and straightforward: all other things being equal, an increase in the

²⁶ Tappan, *Crime, Justice and Correction* (1960), p. 241. See, also, Berns, "Justified Anger: Just Retribution," *Imprimis* (Vol. 3, No. 6, June 1974); *Encyclopaedia Britannica, The Great Ideas: A Syntopicon of Great Books of the Western World* (Vol. II, 1952), pp. 488-492.

²⁷ Tappan, *Crime, Justice and Correction* (1960), p. 241, fn. 3.

severity of consequences threatened should reduce the number of people willing to run the risk of committing a particular criminal act * * *.²⁸

* * *

* * * when penalties for criminal activity that many people find attractive are quite low, thereby making crime a reasonable alternative to legitimate means of obtaining gratification for many persons, even a high probability of apprehension may leave a high rate of the threatened behavior, and increases in the severity of threatened consequences can be expected to have a more substantial marginal deterrent effect than if the level of consequences threatened is already quite high in relation to the benefits obtainable through criminal means.²⁹

* * *

* * * if potential offenders believe that their chances of apprehension cannot be dismissed, the risk of a high penalty provides more incentive to avoid crime than the risk of a low penalty.³⁰

* * *

* * * it is likely that increases in the severity of threatened consequences are more or less significant, depending on the relationship between size of penalty increase and size of base penalty.³¹

If we are hopeful of the curative effects of a threat, we have to make the threat unpleasant, which is another way of saying that we have to be severe.³²

²⁸ Zimring, *Perspectives on Deterrence*, Crime and Delinquency Issues, A Monograph Series, National Institute of Mental Health — Center for Studies of Crime and Delinquency (1971), 83-84.

²⁹ *Id.* at 84.

³⁰ *Id.* at 85.

³¹ *Id.* at 89.

³² Puttkammer, *Administration of Criminal Law* (1953), 16-17.

Dr. Zimring, a noted authority, capsulizes this concept in answering the question, "how can the legal system make the best use of variations in severity [of sanctions] to achieve social defense?" by stating:³³

One answer is that, since the goal of all legal threats is to keep the population law abiding, the potential effectiveness of variations in severity of threatening consequences should be used to create the widest possible distinction between criminal and noncriminal behavior by threatening all types of serious crime with penalties which are as severe as possible. The aim of this strategy is to create a walled fortress around criminal activity by using the full power of threatened consequences to keep potential criminals from becoming actual criminals.

Another possible strategy would be to threaten all serious crimes with major penalties, but to save a considerable amount of variation in threatened penalties to underscore distinctions between *types of crime*, as well as between serious crime and law-abiding behavior.

Johannes Andenaes, of the University of Oslo, regarded by many as one of the most distinguished of the modern scholars writing about deterrence, states that the "simplest way to make people more law-abiding, therefore, is to increase the punishment."³⁴ Mr. Andenaes believes that Feuerbach's formula of psychological coercion: "the risk for the lawbreaker must be made so great, the punishment so severe, that he knows he has more to lose than he has to gain from his crime" has a "certain validity" as to violators of "economic regula-

³³ Zimring, *Perspectives on Deterrence*, Crime and Delinquency Issues, a Monograph Series, National Institute of Mental Health — Center for Studies of Crime and Delinquency (1971), 90.

³⁴ Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 191.

tions.”³⁵ “(E)conomic crimes,” to utilize his epithet, are clearly within the purview of the foregoing severity doctrine, such crimes being violations of “governmental regulation of the economy: price violations, rationing violations, unlawful foreign exchange transactions, offenses against workers protection, disregard of quality standards, and so on.”³⁶

The applicability of severe sanctions to deter violations of “regulations governing commerce” and other “economic” regulations is succinctly treated by Andenaes:

I shall begin with a group of crimes which play a modest role in the literature but which have a good deal of practical importance and are good for illustration, all these *police regulations* which are such commonplaces in modern times: traffic ordinances, building codes, laws governing the sale of alcoholic beverages, regulations governing commerce, etc. Here there is no doubt that punishment for infraction has primarily a general-preventive function. Here nearly all of use are potential criminals. A public-spirited citizen has, of course, certain inhibitions against breaking laws and regulations. But experience shows that moral and social inhibitions against breaking the law are not enough in themselves to insure obedience, where there is conflict with one's private interests. Thus the extent to which there can be effective enforcement by means of punishment determines to what extent the rules are actually going to be observed.³⁷

* * *

³⁵ Andenaes, “General Prevention — Illusion or Reality?,” 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 178-179, 185.

³⁶ *Id.* at 184.

³⁷ Andenaes, “General Prevention — Illusion or Reality?,” 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 182.

A large number of the people who are affected by economic regulations * * * feel no strong moral inhibition against infraction. They often find excuses for their behavior in political theorizing: they oppose the current government's regulative policies; * * *. Yet the matter of obedience or disobedience can often have important economic consequences. * * * In this area, at any rate, Feuerbach's law of general prevention has a certain validity: it is necessary that consideration as to the risk involved in breaking the law should outweigh consideration of the advantages to breaking the law.³⁸

Andenaes is careful to note that severity of punishment has a more salient effect on crimes, like economic violations, "committed after careful consideration * * * than for crimes which grow out of emotions or drives which overpower the individual (e.g. the so-called crimes of passion)."³⁹

Isaac Ehrlich, in one of the most sophisticated analyses of criminal activity ever made, using a simultaneous equation model for a regression analysis involving fourteen variables, found that the "rate of specific crime categories, with virtually no exception, varies inversely with estimates of the probability of apprehension and punishment by imprisonment * * * and with the average length of time served in state prisons * * *."⁴⁰

Similarly, Professor Gordon Tullock states that "multiple regression studies show that increasing the frequency or severity of the punishment does reduce the likelihood that a given crime will be committed" (emphasis supplied).⁴¹ Pro-

³⁸ *Id.* at 185.

³⁹ *Id.* at 192.

⁴⁰ Ehrlich, "Participation in Illegitimate Activities: A Theoretical and Empirical Investigation," *Journal of Political Economy*, Vol. 81 (May-June, 1973), p. 545.

⁴¹ Tullock, "Does Punishment Deter Crime?" *The Public Interest* (No. 36, Summer 1974), 103, 109.

fessor Tullock concludes: "We have an unpleasant method—deterrence—that works, and a pleasant method—rehabilitation—that (at least so far) never has worked."⁴²

My views with respect to the necessity for severe sanctions for serious violations, in order to achieve the Congressional purpose of the Department's regulatory programs, were set forth in *In re Sy B. Gaiber & Co.*, in a Ruling on Petition for Reconsideration, as follows (31 Agriculture Decisions 843, 850-851 (1972)):

Congress enacted the remedial regulatory programs administered by the Department because of a need for economic law and order in the marketplace. The administrative sanctions imposed against violators of such regulatory programs should tend to achieve that purpose.

Persons who engage in a regulated business have been granted a privilege. Suspension or revocation of the privilege for failure to comply with the statutory standards is a necessary power granted to the Secretary to assure a proper adherence to the regulatory program (see the cases cited in the Decision and Order herein, p. 47). Just as a lawyer may lose his privilege to practice law if he embezzles a client's funds or engages in other serious violations, a futures commission merchant, broker, or trader who manipulates a futures market or engages in other serious violations may lose his privilege to engage in futures trading.

It is the general administrative practice under the Department's regulatory programs to institute formal actions only as to violations regarded as serious or repeated. Many minor violations are disposed of with a warning letter or an informal stipulation. Hence it is to be expected that the relatively few formal cases which are instituted will generally warrant relatively severe sanctions.

⁴² *Id.* at 110.

To summarize, a strong argument can be made in support of any philosophy of punishment or sanctions, ranging from extremely light to very severe. There are many excellent judges, criminologists, and sociologists at either end of the poles of this issue; many others take a position between the poles. For the reasons set forth above, where the violation is serious or repeated, I believe in severe sanctions to deter future violations by the respondent and others.

Another principle in determining the sanction to be imposed in a particular case is that, in general, there should be a reasonable relationship between the sanction and the unlawful practices found to exist.⁴³ In other words, the more serious the violation, the more severe should be the sanction. Even though punishment for the sake of punishment is not a relevant consideration in the field of administrative law, the principle of having a reasonable relationship between the violation and the sanction still has validity in a case of this nature. This is because in order to achieve the major Congressional purposes of the regulatory program, it is more important to deter serious violations than minor violations. Hence a severe sanction for a serious violation will have a greater deterrent effect than a milder sanction for a lesser violation, and thus will tend to effectuate the major objectives of the regulatory program.

In addition, in determining sanctions to be imposed under the Act, great weight should be given to the recommendation

⁴³ *Kent v. Hardin*, 425 F.2d 1346, 1349-1350 (C.A. 5); *G. H. Miller & Company v. United States*, 260 F.2d 286, 295-297 (C.A. 7, *en banc*), certiorari denied, 359 U.S. 907; *Daniels v. United States*, 242 F.2d 39, 42 (C.A. 7), certiorari denied, 354 U.S. 939; *Irving Weis & Co. v. Brannan*, 171 F.2d 232, 235 (C.A. 2); *In re American Fruit Purveyors, Inc.*, 30 Agriculture Decisions 1542, 1596 (1971), *In re Louis Romoff*, 31 Agriculture Decisions 158, 177 (1972). See, also, *American Power Co. v. S. E. C.*, 329 U.S. 90, 112-118; *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 194; *Great Western Food Distributors v. Brannan*, 201 F.2d 476, 484 (C.A. 7), certiorari denied, 345 U.S. 997; *In re Electric Power & Light Corporation*, 176 F.2d 687, 692 (C.A. 2); *Wright v. Securities and Exchange Commission*, 112 F.2d 89, 95 (C.A. 2).

of the officials charged with the responsibility for administering the regulatory program. See *In re Sy B. Gaiber & Co.*, Ruling on Reconsideration, 31 Agriculture Decisions 843, 845-846 (1972). Such administrative officials, during the day-to-day administration of a regulatory program, develop a "feel" for the severity of sanctions needed to serve as a deterrent to violations that cannot be developed by the Administrative Law Judges or the Judicial Officer, who come in contact with only a small part of the regulatory program.

The recommendation of the administrative officials as to the sanction is not, of course, controlling. For example, if some of the allegations are not proven or if there are mitigating circumstances not taken into consideration by the administrative officials, the sanction may be considerably less than that recommended by them. See, e.g., *In re American Fruit Purveyors, Inc.*, 30 Agriculture Decisions 1542 (1971). But if the alleged violations are proven, and it appears that the administrative officials have fully considered the respondent's contentions, the recommendation of the administrative officials as to the sanction needed to serve as an effective deterrent to the respondent and to other potential violators should be given great weight. Recognizing the greater opportunity for such administrative officials to develop expertise in this area, it will be the policy of the Judicial Officer never to increase the sanction recommended by the administrative officials.

Insofar as practicable, the sanctions imposed under a regulatory Act against comparable violators for comparable violations should be reasonably uniform.⁴⁴ From the begin-

⁴⁴ Inequality in judicial sentencing occurs "every day, often in different courtrooms in the same courthouse. Two boys fail to report for military induction—one is sentenced to five years in prison, the other gets probation and never enters a prison. One judge sentences a robber convicted for the third time to one year in prison, while another judge on the same bench gives a first offender ten years. One man far more capable of serious crime than another and convicted of the same offense may get a fine, while the less fortunate and less dangerous person is sentenced to five years in the state

ning, the Judicial Officer has recognized that "[d]isciplinary action taken under * * * [a regulatory] act should follow some general pattern, * * * so that one order will not be entirely out of line with another involving similar violations." *In re Watkins Commission Company, Inc.*, 4 Agriculture Decisions 395, 400 (1945). See, also, *In re Arnold Fairbank*, 27 Agriculture Decisions, 1371, 1384 (1968); *In re Nolan E. Poovey, Jr.*, 27 Agriculture Decisions 1512, 1520-1522 (1968); *In re Boone Livestock Company, Inc.*, 27 Agriculture Decisions 475, 503 (1968); *In re Milton Silver, d/b/a Chambersburg Livestock Sales*, 21 Agriculture Decisions 1438, 1452 (1962); *In re American Fruit Purveyors, Inc.*, 30 Agriculture Decisions 1542, 1595-1596 (1971); *In re Louis Romoff*, 31 Agriculture Decisions 158, 177 (1972).⁴⁵

In determining whether one case is comparable to another, all of the relevant facts and circumstances must be considered, such as the nature of the violations, the nature of the respondents' businesses, the respondents' prior record as to violations, the deliberateness of the violations, prior warnings given to the respondents, etc.

Also, the goal of uniform sanctions for comparable violations necessarily applies only to contested cases. Consent orders issued without a hearing should be given no weight whatsoever in determining the sanction to be imposed in a litigated case. In a case where a consent order is agreed to by the parties, there is no record or argument to establish the basis for the sanction. It may seem less than appears warranted because of problems of proving the allegations of the complaint or because of mitigating circumstances not re-

penitentiary." Clark, *Crime in America* (1970), p. 224. There is no excuse for such erratic sanctions in administrative disciplinary proceedings before a single agency.

⁴⁵ Accordingly, counsel should, in all cases, in their briefs and arguments, refer to *relevant* prior cases under the Act which should be considered in determining the appropriate sanction to be imposed in the particular case, in the event a violation is found to have occurred.

vealed to the Administrative Law Judge or the Judicial Officer. Other circumstances, such as personnel and budget considerations and the delay inherent in litigation, may also cause a consent order to seem less severe than appropriate. Conversely, a consent order may seem more severe than appears warranted because of aggravated circumstances not revealed by the complaint.

In some cases, following the "deterrent policy" set forth above may lead to the imposition of a sanction more severe than the sanctions previously imposed under the Act for similar violations. If so, uniformity must yield to effectiveness. An effective sanction will be issued in such cases even if it is more severe than sanctions previously imposed for similar violations. In such circumstances, uniformity will be achieved only as to cases subsequent thereto.

In other words, uniformity is a desirable goal; but it is not an absolute requirement. A respondent has no inherent right to a sanction no more severe than that applied to others. See *Hiller v. Securities and Exchange Commission*, 429 F.2d 856, 858-859 (C.A. 2); *G. H. Miller & Company v. United States*, 260 F.2d 286, 296 (C.A. 7), certiorari denied, 359 U.S. 907. As the Court held in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 186: "We read the Court of Appeals' opinion to suggest that the sanction was 'unwarranted in law' because 'uniformity of sanctions for similar violations' is somehow mandated by the Act. We search in vain for that requirement in the statute."

An agency is free to reconsider sanctions previously imposed without prior notice. *Communications Comm'n v. WOKO*, 329 U.S. 223, 228; *Continental Broadcasting v. Federal Comm. Comm'n.*, 439 F.2d 580, 582-584 (C.A. D.C.); *N.L.R.B. v. Majestic Weaving Co.*, 355 F.2d 854, 860 (C.A. 2); quoted with approval in Davis, *Administrative Law Treatise* (1970 Supp.), § 17.08, p. 604.

In *Communications Comm'n v. WOKO*, 329 U.S. 223, 228, the Court held: "Much is made in argument of the fact that deceptions of this character have not been uncommon and it is claimed that they have not been dealt with so severe-

ly as in this case. * * * The mild measures to others and the apparently unannounced change of policy are considerations appropriate for the Commission in determining whether its action in this case is too drastic, but we cannot say that the Commission is bound by anything that appears before us to deal with all cases at all times as it has dealt with some that seem comparable."

Similarly, in *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187, the Court held that the "employment of a sanction within the authority of an administrative agency is thus not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."

As I stated in *In re Sy B. Gaiber & Co.*, Ruling on Reconsideration, 31 Agriculture Decisions 843, 850 (1972):

In any case in which the Judicial Officer determines that the sanctions previously imposed for similar violations are not adequate under present circumstances to effectuate the purposes of the regulatory program, a more severe sanction will be imposed in that case, rather than merely announcing that in future cases the sanction will be increased. An administrative agency is free to reconsider sanctions previously imposed without prior notice (see *In re Louis Romoff*, 31 Agriculture Decisions 158, 186, and cases cited therein), and such practice will be routinely followed. Persons who intentionally violate a regulatory program are not playing a game under which they are entitled to consider the sanctions previously imposed for similar violations and determine whether they want to run the risk of detection and the imposition of such a sanction. They run the distinct risk that a more severe sanction will be imposed against them.

To conclude this extended discussion as to the Department's sanction policy, Congress has determined that there is a need for Federal regulation of the agricultural marketing system. To achieve the Congressional purposes with respect to the various remedial statutes administered by the Depart-

ment, severe sanctions must be imposed for serious violations. We have no reasonable alternative. "For whatever our opinion may be on the question of free versus controlled economy, there is no denying that ineffective regulation is the worst arrangement of them all."⁴⁰

⁴⁰ Andenaes, "General Prevention — Illusion or Reality?," 43 *The Journal of Criminal Law, Criminology and Police Science* (1952), 176, 184.

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

P. & S. Docket No. 6449

In re: Richard N. Garver

Respondent

Decision and Order
(Received January 29, 1986)

Preliminary Statement

This is a disciplinary proceeding under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. § 181 *et seq.*), hereafter referred to as the "Act", instituted by a complaint filed on November 8, 1984, by the Administrator, Packers and Stockyards Administration, United States Department of Agriculture.

The complaint charges that the respondent's financial condition does not meet the requirements of the Act (7 U.S.C. §§ 204) and that he willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by issuing nonsufficient funds checks and failing to pay, when due, for livestock.

Respondent filed an answer on January 1, 1985, in which he admitted all but one of the material allegations of the complaint. An oral hearing was held in Cincinnati, Ohio on September 18, 1985. Respondent was represented by Thomas R. Smith, Esq., and complainant was represented by Barbara S. Harris of the Office of the General Counsel. At the close of the hearing the time was set for the filing of briefs.

Findings of Fact¹

1. Richard N. Garver, hereafter referred to as the respon-

¹ Findings 1 through 7, accepted as accurate by respondent, are restated herein. Findings 8, 9, and 10 were proposed by respondent and are included herein, along with my additional findings 11 through 16.

dent, is an individual whose business mailing address is 9226 Hiner Road, Wooster, Ohio 44691.

2. The respondent, at all times material herein, was:

(1) Engaged in the business of buying and selling livestock in commerce for his own account; and

(2) Registered with the Secretary of Agriculture as a dealer to buy and sell livestock in commerce.

3. As of September 30, 1984, the respondent's current liabilities exceeded his current assets.

4. Respondent's current liabilities presently exceed his current assets.

5. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below, purchased livestock and in purported payment therefor, issued checks which were returned unpaid by the bank upon which they were drawn because respondent did not have sufficient funds on deposit and available in the account upon which such checks were drawn.

DATE OF CHECK (1984)	CHECK ISSUED TO	NO. OF HEAD	AMOUNT OF CHECK
9/22	Paul Stewart	75	27,454.61
9/22	Marietta Livestock Sales	28	9,907.15
9/17	Scio Livestock Auction	11	3,407.96
9/23	Scio Livestock Auction		1,319.27
9/15	Bill Martin		36,084.40
9/18	Producer's Lvsk. Assoc.	132	67,369.99
9/24	Producer's Lvsk. Assoc.	215	130,063.83
9/18	Producer's Lvsk. Assoc.	44	32,932.47
9/19	Producer's Lvsk. Assoc.	45	32,277.67
9/19	Producer's Lvsk. Assoc.	128	64,061.78
9/24	Producer's Lvsk. Assoc.	211	141,303.32
9/15	Athens Livestock	40	12,213.97
9/15	Jerry Caldwell	163	45,231.54
9/20	Jerry Caldwell	274	73,271.71

6. Respondent, in connection with his operations as a dealer, on or about the dates and in the transactions set forth below and in Finding of Fact No. 5, purchased livestock and failed to pay, when due, the full purchase price of such livestock.

1984 DATE OF PURCHASE	PURCHASED FROM	AMOUNT	NO. OF HEAD
9/24	Carrollton Livestock Auction	5,086.65	14
9/17, 19	Muskingum Livestock Sales	19,408.10	58
9/22	Paul Stewart	32,451.65	97
9/8, 15, 22	Barnesville Livestock	15,794.76	92
9/20	Chickasaw Stock Yard	4,082.04	10
	Scio Livestock Auction	2,177.38	
9/21	Livestock Market of Spencer	7,299.35	20
9/3, 10, 11	Bill Martin	202,460.18	432
9/11, 18	Roger Taylor	31,609.50	82
8/10	Athens Livestock	1,239.00	1
9/15	Athens Livestock	9,199.50	26
9/22	Athens Livestock	8,717.11	26
9/22	United Livestock Sales Co.	23,306.87	64
9/24	Jerry Caldwell	13,705.88	55

7. As of September 18, 1985, these remained unpaid a total of at least \$700,000.00 for such livestock purchases set forth in Findings of Fact Nos. 5 and 6.

8. For ten (10) years prior to September, 1984, respondent had a business arrangement with his bank under the terms of which the bank honored all overdrafts on his account and charged respondent a fee established by the bank for doing so.

9. At the time that respondent issued the checks identified in Finding No. 5, the arrangement with the bank was in full force and effect and respondent had no reason to believe that the checks would not be honored by his bank.

10. Respondent did not provide checks to persons from whom he had purchased cattle knowing that those checks would be returned because of insufficient funds.

11. Respondent's bank arrangement, noted in Findings 8 and 9, whereby the bank would pay for respondent's overdrafts, was secured by property. When the property was sold there was no longer any collateral to secure respondent's line of credit, and the bank terminated the agreement.

12. Respondent's bookkeeping methods were archaic if not primitive. He maintained no records of accounts receivable and, consequently, had no way of knowing how much he was owed or by whom. For example, respondent testified that it was his custom to visit his bookkeeper once a month, taking all of his bills, sales slips, and bank statements to her in a grocery bag.

13. Since early 1985, respondent has been working as a commissioned buyer of livestock for Elden Ginn who operates a stockyard and sells cattle on a commission basis only. In order to have respondent work for him, it was necessary for Mr. Ginn to increase his own bond from \$55,000.00 to \$100,000.00.

14. Under respondent's arrangement with Ginn, respondent is paid \$275.00 per week for salary and expenses. All commissions earned by him are segregated and (except for taxes, a \$100.00 per month payment to Ginn's bookkeeper, and respondent's \$275.00 salary) are distributed to respondent's creditors quarterly. The arrangement is contained in respondent's Exhibit No. 1. Respondent acts purely as an agent for Ginn and has no access to funds.

15. At the time of hearing (September 18, 1985), approximately \$4,800.00 had been distributed to creditors under the arrangement with Ginn and it was expected that approximately \$6,000.00 more would be paid within several weeks of the hearing.

16. Respondent had not been suspended under the Act prior to this proceeding.

Conclusions

All contentions of the parties have been considered in the light of the record evidence. By reason of the above findings

of fact, it is concluded that respondent's financial condition does not meet the requirements of the Act (7 U.S.C. § 204), and that respondent willfully violated sections 312(a) and 409 of the Act (7 U.S.C. §§ 213(a), 228b) by failing to pay, when due, and by issuing nonsufficient funds checks, for livestock. The order proposed by complainant is issued, but modified to permit respondent to continue in the employ of Elden Ginn after completion of a 30 day period of suspension.

Willful Violations of the Act

Complainant correctly contends that respondent's failure to pay for livestock and respondent's issuance of nonsufficient funds checks were willful violations of Sections 312(a) and 409 of the Act.

Respondent admits such practices but argues that his relationship with his bank and the over-draft protection the bank extended to him demonstrate that he did not willfully engage in the practices in violation of the Act. However, the unilateral termination by the bank of the respondent's over-draft protection demonstrates precisely why such arrangement cannot insulate a livestock buyer from accountability under the Act. It gives no protection to the sellers of livestock. Respondent's awareness or state of mind at the time the bad checks were issued is of no consequence.

A line of credit or over-draft protection does not provide respondent's creditors the financial security required by the Act and regulations. Despite Mr. Garver's longstanding and friendly relationship with his bank, his bank lawfully and unilaterally terminated his over-draft protection without notice. Similarly, over-draft protection would be of no value if respondent's bank were to fail. As stated in *In re Thumb Auction Markets, Inc.*, 37 A.D. 164, 167-168 (1977). "Such protection fails to fulfill respondent's obligation under statutory and regulatory requirements. . . ."

Decisions under the Act and regulations have established that a line of credit or over-draft protection extended by a bank is no defense to a charge of insolvency. *In re Thumb*

Auction Markets, Inc., *supra*; *In re Hugh B. Powell*, 41 A.D. 1354, 1360 (1982); *In re Sechrist Sales Co.*, 36 A.D. 665, 668, 670-75 (1977); *In re Harry Hardy*, 33 A.D. 1383, 1401 (1974). Similarly, over-draft protection cannot be a defense to a charge of issuing insufficient funds checks.

A violation is willful if the respondent intentionally does an act which is prohibited, irrespective of evil motive or reliance on erroneous advice, or if the respondent acts with careless disregard of the statutory requirements. *Butz v. Glover Livestock Commission Co.*, 411 U.S. 182, 185, 187 (1973); *Goodman v. Benson*, 286 F.2d 896, 900 (CA 7 1961); *In re Miller*, 33 A.D. 53, 83-87, *aff'd sub nom.*, *Miller v. Butz*, 498 F.2d 1088 (CA 5 1974); *In re Lufkin Livestock Exchange, Inc.*, 27 A.D. 596, 609 (1968).

Here, the practices engaged in by respondent must be characterized as willful.

Respondent operated completely in the dark regarding the financial condition of his business. He maintained no record of his sales and hence did not know who owed him or how much he was owed. He relied solely on a credit arrangement with a bank to pay his overdrafts, and then sold the property which was the collateral for the credit arrangement. This state of affairs led to the respondent's failure to pay for livestock and his issuance of nonsufficient funds checks. At the very least respondent's actions and course of conduct were in careless disregard of the requirements of the Act.

On fourteen separate occasions, respondent issued checks in purported payment for livestock which were returned for nonsufficient funds in his account. In another fourteen transactions, respondent admits that he failed to give his sellers payment for the livestock he purchased. The failure to pay promptly and in full for livestock and the issuance of "nonsufficient funds" checks have been held to violate Sections 312(a) and 409 of the Act. *Lewis v. Butz*, 512 F.2d 681, 682-83 (CA 8, 1975); *In re Bryan*, 36 A.D. 37, 42 (1977); *In re Mid-States Livestock, Inc.*, 37 A.D. 547, 561-562 (1977), *aff'd sub nom Van Wyk v. Bergland*, 570 F.2d 701, 704-705 (CA 8 1978); *In*

re Trenton Livestock, Inc., 41 A.D. 1965 (1982); *In re Edwards*, 37 A.D. 1880, 1887 (1978).

In addition, respondent admitted that as of September 30, 1984, his current liabilities exceeded his current assets and that as of the date of the filing of the complaint, his current liabilities also exceeded his current assets. Under the Act, the principal test of insolvency is whether current liabilities exceed current assets. This test has been reviewed and affirmed by the Fifth Circuit in *Bowman v. United States*, 363 F.2d 81 (CA 5 1966).

Once insolvency has been established, it is considered as continuing until a respondent demonstrates that he is no longer insolvent. *In re Hugh B. Powell, supra*, at 1359-1360; *In re Donald Hageman*, 42 A.D. 531, 539-540 (1983).

Because respondent was insolvent on September 30, 1984 and November 8, 1984, it is clear that he failed to meet the financial requirements of the Act. (7 U.S.C. § 204).

Sanction

Respondent does not contest the factual allegations of the complaint. His sole argument is directed to the proposed sanction sought by the complainant. The complainant requests that respondent be ordered to cease and desist from the practices alleged and that he be suspended for a period of two years and thereafter until he demonstrates his solvency.

Complainant urges at page 6 of its brief:

In 1976, Congress recognized the importance of assuring livestock producers prompt payment for the livestock they sell by amending the Packers and Stockyards Act to include section 409 (7 U.S.C. § 228b). This section, which embodies the prompt payment provisions, was enacted to insure financial integrity in the livestock industry and to prevent economic disaster to livestock sellers (Tr. 10). So crucial is the requirement of prompt payment to the financial stability of the livestock industry, a cash basis industry, that Congress uniformly imposed it on all persons subject to the Act's jurisdiction.

The testimony at the oral hearing was unequivocal and extensive that due to the congressional mandate set forth above, the Packers and Stockyards Administration considers violation of the prompt payment provisions of section 409 to be very serious (Tr. 12, 13). Mr. Brinckmeyer testified that these practices are damaging to the individual market agency, dealer or producer who does not receive timely payment, and damaging to the industry as a whole. (Tr. 11).

Further, the Judicial Officer has held repeatedly that it is the policy of the Department to impose severe sanctions upon respondents who have engaged in serious or repeated violations of the regulatory laws administered by the Department. This policy has been adopted in order to serve as an effective deterrent to the respondent as well as to other potential violators. *In re Braxton M. Worsley*, 33 A.D. 1547, 1556-1561 (1974). The Judicial Officer has also stated that the recommendation of the administrative officials with respect to the sanction is to be given great weight since they administer the program on a daily basis and are in the best position for observing whether the sanctions imposed serve as an effective deterrent to future violations by respondents and others. *In re Worsley, supra*, at 1568.

In light of the nature and seriousness of the violations committed, the sanction requested is appropriate and clearly warranted in the circumstances. At the same time, some consideration should be given to respondent's plea that an order be formulated permitting respondent to continue in the livestock industry with the safeguards that are presently in place. This I believe is possible within the framework of the sanction proposed by complainant.

A modification appears appropriate for several reasons. Respondent was not subject to prior suspensions nor was there any indication of an intent to defraud his creditors. His faults lay in his failure to establish good accounting practices and blind reliance of a credit arrangement with his bank. These failings appear to be remedied through his present arrange-

ment with is employer, Elden Ginn (Findings 13 and 14, and respondent's Exhibit 1). Further, under such arrangement, respondent's creditors receive a token repayment of the indebtedness. (Findings 14, 15). While such payment is no defense to the violations of the Act (complainant's main brief, page 5), it represents a good faith attempt to repay his indebtedness.

Under the order as contained herein, respondent is suspended as a registrant for two years and thereafter until he demonstrates that he is no longer insolvent, as complainant recommends. However, after a 30 day period of suspension (the enormity of the violations requires at least an initial 30 day suspension) the remainder of the two year suspension is suspended for so long as respondent remains in the employ of Elden Ginn in accordance with the present arrangement contained in the record. Should such arrangement terminate after a three month period, for example, the remaining 20 months of the 2 year suspension of registration would become effective. If after expiration of the two year period, respondent can demonstrate he is no longer insolvent, a supplemental order will be issued terminating the suspension.

The order herein will serve as an effective deterrent to future violations by respondent and others, and at the same time permit respondent's employment in an endeavor in which he has worked all of his life.

Order

Respondent Richard N. Garver, his agents and employees, individually or through any corporate or other device, in connection with his activities subject to the Packers and Stockyards Act, shall cease and desist from:

1. Issuing checks in payment for livestock without having and maintaining sufficient funds on deposit and available in the account upon which they are drawn to pay the checks when presented;

2. Failing to pay, when due, the full purchase price of livestock; and

3. Failing to pay the full purchase price of livestock.

Respondent is suspended as a registrant under the Act for two (2) years and thereafter until such time as he demonstrates that he is no longer insolvent; *provided*, that after expiration of a 30 day period, the remainder of the two year suspension is held in abeyance on condition that: respondent remains in the employ of Elden Ginn in accordance with the employment and escrow agreement recited in Findings 13, 14, and in Respondent's Exhibit 1; and Elden Ginn maintains a bond adequate to include respondent's employment. When the respondent demonstrates that he is no longer insolvent, a supplemental order will be issued in this proceeding terminating this suspension after expiration of the two-year period.

The provisions of this order shall become final and effective 35 days after the date of service of this order on respondent, unless appealed by either party within 30 days after service. (9 CFR §§ 1.145(a) and 1.142(c)).

Copies of this decision and order shall be served upon the parties.

Done this 29th day of January 1986
in Washington, D.C.

/s/ JOHN A. CAMPBELL
Administrative Law Judge



APPENDIX B

CONSTITUTION OF THE UNITED STATES OF AMERICA 1787

**ARTICLES IN ADDITION TO, AND AMENDMENT OF
THE CONSTITUTION OF THE UNITED STATES OF
AMERICA, PROPOSED BY CONGRESS, AND RATI-
FIED BY THE LEGISLATURES OF THE SEVERAL
STATES, PURSUANT TO THE FIFTH ARTICLE OF
THE ORIGINAL CONSTITUTION.**

ARTICLE [V.]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of war or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

§ 554. Adjudications

* * *

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency.

Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

- (1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or
- (2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency.

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that, or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

- (A) in determining applications for initial licenses;
- (B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or
- (C) to the agency or a member or members of the body comprising the agency.

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision

* * *

(b) There shall preside at the taking of evidence—

- (1) the agency;
- (2) one or more members of the body which comprises the agency; or
- (3) one or more administrative law judges appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at

any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses

* * *

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceeding therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency.

TITLE 7—AGRICULTURE

CHAPTER 9—PACKERS AND STOCKYARDS

**SUBCHAPTER III—STOCKYARDS AND
STOCKYARD DEALERS**

§ 201. “Stockyard owner”; “stockyard services”; “market agency”; “dealer”; defined

When used in this chapter—

* * *

(d) The term “dealer” means any person, not a market agency, engaged in the business of buying or selling in commerce livestock, either on his own account or as the employee or agent of the vendor or purchaser.

§ 203. Activity as stockyard dealer or market agency; benefits to business and welfare of stockyard; registration; penalty for failure to register

After the expiration of thirty days after the Secretary has given public notice that any stockyard is within the definition of section 202 of this title, by posting copies of such notice in the stockyard, no person shall carry on the business of a market agency or dealer at such stockyard unless (1) the stockyard owner has determined that his services will be beneficial to the business and welfare of said stockyard, its patrons, and customers, which determination shall be made on a basis which is not unreasonable or unjustly discriminatory, and has given written authorization to such person, and (2) he has registered with the Secretary, under such rules and regulations as the Secretary may prescribe, his name and address, the character of business in which he is engaged, and the kinds of stockyards services, if any, which he furnishes at such stockyard. Every other person operating as a market agency or dealer as defined in section 201 of this title may be required to register in such manner as the Secretary may prescribe. Whoever violates the provisions of

this section shall be liable to a penalty of not more than \$500 for each such offense and not more than \$25 for each day it continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

§ 204. Bond and suspension of registrants

On and after July 12, 1943, the Secretary may require reasonable bonds from every market agency (as defined in this subchapter), every packer (as defined in subchapter II of this chapter) in connection with its livestock purchasing operations (except that those packers whose average annual purchases do not exceed \$500,000 will be exempt from the provisions of this paragraph), and every other person operating as a dealer (as defined in this subchapter) under such rules and regulations as he may prescribe, to secure the performance of their obligations, and whenever, after due notice and hearing, the Secretary finds any registrant is insolvent or has violated any provisions of this chapter he may issue an order suspending such registrant for a reasonable specified period. Such order of suspension shall take effect within not less than five days, unless suspended or modified or set aside by the Secretary or a court of competent jurisdiction. If the Secretary finds any packer is insolvent, he may after notice and hearing issue an order under the provisions of section 193 of this title requiring such packer to cease and desist from purchasing livestock while insolvent, or while insolvent purchasing livestock except under such conditions as the Secretary may prescribe to effectuate the purposes of this chapter.

§ 213. Prevention of unfair, discriminatory, or deceptive practices

(a) It shall be unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection

with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.

SUBCHAPTER V—GENERAL PROVISIONS

§ 228b. Prompt payment for purchase of livestock

(a) Full amount of purchase price required; methods of payment

Each packer, market agency, or dealer purchasing livestock shall, before the close of the next business day following the purchase of livestock and transfer of possession thereof, deliver to the seller or his duly authorized representative the full amount of the purchase price: *Provided*, That each packer, market agency, or dealer purchasing livestock for slaughter shall, before the close of the next business day following purchase of livestock and transfer of possession thereof, actually deliver at the point of transfer of possession to the seller or his duly authorized representative a check or shall wire transfer funds to the seller's account for the full amount of the purchase price; or, in the case of a purchase on a carcass or "grade and yield" basis, the purchaser shall make payment by check at the point of transfer of possession or shall wire transfer funds to the seller's account for the full amount of the purchase price not later than the close of the first business day following determination of the purchase price: *Provided further*, That if the seller or his duly authorized representative is not present to receive payment at the point of transfer of possession, as herein provided, the packer, market agency or dealer shall wire transfer funds or place a check in the United States mail for the full amount of the purchase price, properly addressed to the seller, within the time limits specified in this subsection, such action being deemed compliance with the requirement for prompt payment.

(b) Waiver of prompt payment by written agreement; disclosure requirements

Notwithstanding the provisions of subsection (a) of this section and subject to such terms and conditions as the Secretary may prescribe, the parties to the purchase and sale of livestock may expressly agree in writing, before such purchase or sale, to effect payment in a manner other than that required in subsection (a) of this section. Any such agreement shall be disclosed in the records of any market agency or dealer selling the livestock, and in the purchaser's records and on the accounts or other documents issued by the purchaser relating to the transaction.

(c) Delay in payment or attempt to delay deemed unfair practice

Any delay or attempt to delay by a market agency, dealer, or packer purchasing livestock, the collection of funds as herein provided, or otherwise for the purpose of or resulting in extending the normal period of payment for such livestock shall be considered an "unfair practice" in violation of this chapter. Nothing in this section shall be deemed to limit the meaning of the term "unfair practice" as used in this chapter.

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

§ 455. Disqualification of justice, judge, or magistrate

(a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the

matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceedings;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or

equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) An office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, or magistrate shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

7 CFR Subtitle A (1-1-86 Edition)

SUBTITLE A—OFFICE OF THE SECRETARY OF AGRICULTURE . . .

PART 1—ADMINISTRATIVE REGULATIONS

Subpart H—Rules of practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary Under Various Statutes

§ 1.142 Post-hearing procedure.

* * *

(c) *Judge's decision.* The Judge, within a reasonable time after the termination of the period allowed for the filing of proposed findings of fact, conclusions and orders, and briefs in support thereof, shall prepare, upon the basis of the record and matters officially noticed, and shall file with the Hearing Clerk, the Judge's decision, a copy of which shall be served by the Hearing Clerk upon each of the parties. Such decision shall become final and effective without further proceedings 35 days after the date of service thereof upon the respondent, unless there is an appeal to the Judicial Officer by a party to the proceeding pursuant to § 1.145: *Provided, however,* That no decision shall be final for purposes of judicial review except a final decision of the Judicial Officer upon appeal.

PART 2—DELEGATIONS OF AUTHORITY BY THE SECRETARY OF AGRICULTURE AND GENERAL OFFICERS OF THE DEPARTMENT

Subpart B—General Delegations of Authority by the Secretary of Agriculture

§ 2.35 Delegations of authority to the Judicial Officer.

The following delegations of authority are made by the Secretary of Agriculture to the Judicial Officer:

(a) Pursuant to the provisions of the Act of April 4, 1940 (7 U.S.C. 450c-450g), and Reorganization Plan No. 2 of 1953 (5 U.S.C. 1976 ed., Appendix, p. 764), the Judicial Officer is hereby authorized to act as final deciding officer in adjudica-

tion proceedings subject to 5 U.S.C. 556 and 557; in other adjudication proceedings which are or may be made subject to the "Rules of Practice Governing Formal Adjudicatory Proceedings Instituted by the Secretary under Various Statutes" set forth in 7 CFR Part 1, Subpart H; in adjudication proceedings under the "Rules of Practice Governing Cease and Desist Proceedings Under Section 2 of the Caper-Volstead Act" set forth in 7 CFR Part 1, Subpart I; in rate proceedings under the Packers and Stockyards Act; and in reparation proceedings under statutes administered by the Department. As used herein the term "Judicial Officer" shall mean any person or persons so designated by the Secretary of Agriculture. The provisions of this delegation shall not be construed to limit the authority of the Judicial Officer to perform any functions, in addition to those defined in the said Act of April 4, 1940, which from time to time may be assigned by the Secretary to him.

9 CFR Ch. II (1-1-86 Edition)

Packers and Stockyards Administration

PART 201—REGULATIONS UNDER THE PACKERS AND STOCKYARDS ACT

GENERAL BONDING PROVISIONS

§ 201.27 Underwriter: equivalent in lieu of bonds; standard forms.

(a) The surety on bonds maintained under the regulations in this part shall be a surety company (1) which is currently approved by the United States Treasury Department for bonds executed to the United States, and (2) which has not failed or refused to satisfy its legal obligations under bonds issued under said regulations.

(b) A bond equivalent may be filed in lieu of a bond. A bond equivalent shall be in the form of a trust fund agreement based on funds actually deposited and readily convertible to currency in the amount required by § 201.30. Such

funds shall be invested or deposited, in the name of a trustee as set forth in § 201.32, in: (1) Fully negotiable obligations of the United States, or (2) deposits or accounts insured by the Federal Deposit Insurance Corporation of the Federal Savings and Loan Insurance Corporation. The provisions of §§ 201.27 through 201.34 shall be applicable to such trust agreements.

(c) Bonds and trust fund agreements shall be filed on forms approved by the Administrator.

§ 201.28 Duplicates of bonds or equivalents to be filed with Regional Supervisors.

Fully executed duplicates of bonds or trust fund agreements maintained under the regulations in this part, and duplicates of all endorsements, amendments, riders, indemnity agreements, and other attachments thereto, shall be filed with the Regional Supervisor for the region in which the registrant, or packer or person applying for registration resides, or in the case of a corporation, where the corporation has its home office; *Provided*, That if such registrant, or packer or person does not engage in business in such area, the foregoing documents shall be filed with the Regional Supervisor for the region in which the registrant's or packer's or person's principal place of business is located.

MARKET AGENCY, DEALER AND PACKER BONDS

§ 201.29 Market agencies, packers and dealers required to file and maintain bonds.

(a) Every market agency, packer, and dealer, except as provided in paragraph (d) herein, and except packer buyers registered as dealers to purchase livestock for slaughter only, shall execute and maintain a reasonable bond on forms approved by the Administrator containing the appropriate condition clauses, as set forth in § 201.31 of the regulations, applicable to the activity or activities in which the person or

persons propose to engage, to secure the performance of obligations incurred by such market agency, packer, or dealer. No market agency, packer, or dealer required to maintain a bond shall conduct his operations unless there is on file and in effect a bond complying with the regulations in this part.

(b) Every market agency buying on a commission basis and every dealer buying for his own account or for the accounts of others shall file and maintain a bond. If a registrant operates as both a market agency buying on a commission basis and as a dealer, only one bond to cover both buying operations need be filed. Any person operating as a market agency selling on a commission basis and as a market agency buying on a commission basis or as a dealer shall file and maintain separate bonds to cover his selling and buying operations.

(c) Each market agency and dealer whose buying operations are cleared by another market agency shall be named as cleegee in the bond filed and maintained by the market agency registered to provide clearing services. Each market agency selling livestock on a commission basis shall file and maintain its own bond.

(d) Every packer purchasing livestock, directly or through an affiliate or employee or a wholly-owned subsidiary, except those packers whose annual purchases do not exceed \$500,000, shall file and maintain a reasonable bond. In the event a packer maintains a wholly-owned subsidiary or affiliate to conduct its livestock buying, the wholly-owned subsidiary or affiliate shall be registered as a packer buyer for its parent packer firm, and the required bond shall be maintained by the parent packer firm.

§ 201.30 Amount of market agency, dealer and packer bonds.

(a) *Market agency selling livestock on commission.* To compute the required amount of bond coverage, divide the

dollar value of livestock sold during the preceding business year, or the substantial part of that business year, in which the market agency did business by the actual number of days on which livestock was sold. The divisor (the number of days on which livestock was sold) shall not exceed 130. The amount of bond coverage must be the next multiple of \$5,000 above the amount so determined. When the computation exceeds \$50,000, the amount of bond coverage need not exceed \$50,000 plus 10 percent of the excess over \$50,000, raised to the next \$5,000 multiple. In no case shall the amount of bond coverage for a market agency selling on commission be less than \$10,000 or such higher amount as required to comply with any State law.

(b) *Market agency buying on commission or dealer.* The amount of bond coverage must be based on the average amount of livestock purchased by the dealer or market agency during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased during the preceding business year, or substantial part of that business year, in which the dealer or market agency or both did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of the bond coverage must be the next multiple of \$5,000 above the amount so determined. When the computation exceeds \$75,000, the amount of bond coverage need not exceed \$75,000 plus 10 percent of the excess over \$75,000, raised to the next \$5,000 multiple. In no case shall the amount of bond coverage be less than \$10,000 or such higher amount as required to comply with any State law.

(c) *Market agency acting as clearing agency.* The amount of bond coverage must be based on the average amount of livestock purchased by all persons for whom the market agency served as a clearor during a period equivalent to 2 business days. To compute the required amount of bond coverage,

divide the total dollar value of livestock purchased by all persons for whom the market agency served as a clearor during the preceding business year, or substantial part of that business year, in which the market agency acting as clearing agency did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of bond coverage must be the next multiple of \$5,000 above the amount so determined. When the computation exceeds \$75,000, the amount of bond coverage need not exceed \$75,000 plus 10 percent of the excess over \$75,000, raised to the next \$5,000 multiple. In no case shall the amount of bond coverage be less than \$10,000 or such higher amount as required to comply with any State law.

(d) *Packer*. The amount of bond coverage must be based on the average amount of livestock purchased by the packer during a period equivalent to 2 business days. To compute the required amount of bond coverage, divide the total dollar value of livestock purchased during the preceding business year, or substantial part of that business year, in which the packer did business, by one-half the number of days on which business was conducted. The number of days in any business year, for purposes of this regulation, shall not exceed 260. Therefore, the divisor (one-half the number of days on which business was conducted) shall not exceed 130. The amount of the bond coverage must be the next multiple of \$5,000 above the amount so determined. In no case shall the amount of bond coverage for a packer be less than \$10,000.

(e) If a person applying for registration as a market agency or dealer has been engaged in the business of handling livestock before the date of the application, the value of the livestock handled, if representative of future operations, must be used in computing the required amount of bond coverage. If the applicant for registration is a successor in business to a registrant formerly subject to these regulations, the amount of bond coverage of the applicant must be at least that amount

required of the prior registrant, unless otherwise determined by the Administrator. If a packer becomes subject to these regulations, the value of livestock purchased, if representative of future operations, must be used in computing the required amount of bond coverage. If a packer is a successor in business to a packer formerly subject to these regulations, the amount of bond coverage of the successor must be at least that amount required of the prior packer, unless otherwise determined by the Administrator.

(f) Whenever the Administrator has reason to believe that a bond is inadequate to secure the performance of the obligations of the market agency, dealer or packer covered thereby, the Administrator shall notify such person to adjust the bond to meet the requirements the Administrator determines to be reasonable.

PART 203—STATEMENTS OF GENERAL POLICY UNDER THE PACKERS AND STOCKYARDS ACT

§ 203.10 Statement with respect to insolvency; definition of current assets and current liabilities.

(a) Under the Packers and Stockyards Act, 1921, as amended and supplemented (7 U.S.C. 181 et seq.), the principal test of insolvency is to determine whether a person's current liabilities exceed his current assets. This current ratio test of insolvency under the Act has been reviewed and affirmed by a United States Court of Appeals. *Bowman v. United States Department of Agriculture*, 363 F. 2d 81 (5th Cir. 1966).

(b) For the purposes of the administration of the Packers and Stockyards Act, 1921, the following terms shall be construed, respectively, to mean:

(1) "Current assets" means cash and other assets or resources commonly identified as those which are reasonably expected to be realized in cash or sold or consumed during the normal operating cycle of the business, which is considered to be one year.

(2) "Current liabilities" means obligations whose liquidation is reasonably expected to require the use of existing resources principally classifiable as current assets or the creation of other current liabilities during the one year operating cycle of the business.

(c) The term current assets generally includes: (1) Cash in bank or on hand; (2) sums due a market agency from a custodial account for shippers' proceeds; (3) accounts receivable, if collectable; (4) notes receivable and portions of long-term notes receivable within one year from date of balance sheet, if collectable; (5) inventories of livestock acquired for purposes of resale or for purposes of market support; (6) feed inventories and other inventories which are intended to be sold or consumed in the normal operating cycle of the business; (7) accounts due from employees, if collectable; (8) accounts due from officers of a corporation, if collectable; (9) accounts due from affiliates and subsidiaries of corporations if the financial position of such subsidiaries and affiliates justifies such classification; (10) marketable securities representing cash available for current operations and not otherwise pledged as security; (11) accrued interest receivable; and (12) prepaid expenses.

(d) The term current assets generally excludes: (1) Cash and claims to cash which are restricted as to withdrawal, such as custodial funds for shippers' proceeds and current proceeds receivable from the sale of livestock sold on a commission basis; (2) investments in securities (whether marketable or not) or advances which have been made for the purposes of control, affiliation, or other continuing business advantage; (3) receivables which are not expected to be collected within 12 months; (4) cash surrender value of life insurance policies; (5) land and other natural resources; and (6) depreciable assets.

(e) The term current liabilities generally includes: (1) Bank overdrafts (per books); (2) amounts due a custodial account for shippers' proceeds; (3) accounts payable within one year from date of balance sheet; (4) notes payable or portions thereof due and payable within one year from date of balance

sheet; (5) accruals such as taxes, wages, social security, unemployment compensation, etc., due and payable as of the date of the balance sheet; and (6) all other liabilities whose regular and ordinary liquidation is expected to occur within one year.

CERTIFICATE OF SERVICE

I hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari were served on Raymond W. Fullerton, Assistant General Counsel, Packers and Stockyards Division, Office of General Counsel, United States Department of Agriculture, Washington, D.C. 20250-1400, and the Solicitor General, Department of Justice, Washington, D.C. 20530, by ordinary U.S. Mail this _____ day of May, 1988.
